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Supreme Court, U.S.
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No.

In the OFFICE OF THE CLERK
Supreme Court of the United States

OCTOBER TERM 1999

JAMES SPANGLER, DONALD MELCHER, WAYNE J. BIELEFELDT, ET AL.,
Petitioners,

v.

ALTEC INTERNATIONAL LIMITED PARTNERSHIP, CHART INDUSTRIES, INC. and ALTEC INTERNATIONAL LIMITED PARTNERSHIP PENSION PLAN AND TRUST FOR HOURLY EMPLOYEES,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Court of Appeal's decision conflict with this Court's ruling in *Varity Corp. v. Howe*, 516 U.S. 489, 116 S.Ct. 1965, 134 L.Ed2d 130 (1996) and with decisions in other circuits by holding that in an ERISA breach of fiduciary duty case, the applicable statute of limitations of 29 U.S.C. § 1113(1)(A) can start to run before the benefits in question are denied and before the plaintiffs are aware of the breach?

2. In determining whether or not the ERISA statute of limitations in 29 U.S.C. § 1113(1)(A) bars a claim for a breach of fiduciary duty, does the last act constituting a breach occur when the representee, without knowledge of the future breach, relies on the fudiciary's representations regarding future benefits? Or, does the last act constituting a breach occur when the fiduciary was required, but failed, to perform in accordance with the representations made?

PARTIES TO THE PROCEEDINGS

The plaintiffs-petitioners in this action are James Spangler, Donald Melcher, Wayne J. Bielefeldt, Dale Christianson, Robert Clark, Harold Danielson, Dennis A. Gerke, David Goode, Keith Huber, William Hutschenreuter, Ray Janisch, Oswald A. Klomsten, Jerry Munyon, Emil D. Potaracke, Roderick Sand, Gordon Stenslien, Stanley Stugen, Robert Taylor. Each plaintiff-petitioner is an individual adult.

The defendant-respondent Altec International Limited Partnership, f/k/a Altec International, Inc., f/k/a Albraze International, Inc., is a Delaware limited partnership having its principal place of business at 2191 Ward Avenue, La Crosse, Wisconsin. Thus, it does not have a parent company nor are there any wholly owned subsidiaries.

Further, the defendant-respondent Chart Industries, Inc. is a Delaware corporation having its principal place of business at 35555 Curtis Blvd., Eastlake, Ohio. It has no parent company nor any wholly owned subsidiaries.

Finally, the defendant-respondent Altec International Limited Partnership Pension Plan and Trust for Hourly Employees is an employee pension benefit plan as defined under § 3(2) of ERISA with its principal place of business at 2191 Ward Avenue, La Crosse, Wisconsin. It has no parent company nor any wholly owned subsidiaries.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

CITATIONS OF REPORTS 1

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUIONAL PROVISIONS, STATUTES AND FEDERAL RULES INVOLVED IN THIS CASE .. 3

STATEMENT OF THE CASE 3

A. *Statement of Facts* 3

B. *Basis for Federal Jurisdiction* 11

REASONS FOR GRANTING THE WRIT 12

I. *The Decision of the Court of Appeals Conflicts With the Decisions of Other Courts and Is Inconsistent With Determinations by the Supreme Court* 12

II. *The Decision of the Court of Appeals Departs From the Usual Course of Judicial Proceedings and Is Inconsistent With Long Established Legal Principles so as to Call for an Exercise of This Court's Supervisory Power* 18

III. *The Court of Appeals' Failed to Consider the Inequitable Effects of Its Holding on Petitioners-Plaintiffs and Others* 22

CONCLUSION 24

TABLE OF AUTHORITIES

CASES

Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270, 279 (2ndCir. 1992) 22

Meagher v. International Association of Machinists and Aerospace Workers Pension Plan, 856 F.2d 1418 (9th Cir. 1988) 15, 16

Securities & E. Commission v. Capital Gains Research Bureau, 375 U.S. 180, 192, 84 S.Ct. 275, 283, 11 L.Ed.2d 237, 247 (1963) 21

Starr v. JCI Data Processing, Inc., 767 F.Supp. 633, 637-638 (N.J. 1991) 16, 22

Tolle v. Carroll Touch, Incorporated, 977 F.2d 1129, 1139 (7th Cir. 1992) 16

Varity Corp. v. Howe, 516 U.S. 489, 116 S.Ct. 1965, 134 L.Ed.2d 130 (1996) ..... i, 9, 12, 14, 15, 18, 19, 21, 23

Ziegler v. Connecticut General Life Insurance Company, 916 F2d 548, 552 (9th Cir. 1990) 17

STATUTES

28 U.S.C. § 1254(1) 3

28 U.S.C. § 1331 11

29 U.S.C. § 1113(1)(A) ..... i, 9, 13

29 U.S.C. §1001 *et seq.* 3

29 U.S.C. §1113 ..... 3, 15

ERISA § 413 ..... 9, 12

ERISA §502(a)(1)(B) 7, 8

ERISA §502(a)(3) 7, 8

Sup. Ct. R. 10(a) and (c) 1

Sup. Ct. R. 13(1) 3

Wis. Stat. §100.18 ..... 7, 8

OTHER AUTHORITIES

37 C.J.S. *Fraud* §7 Breach of Fiduciary Duty, page 183 .. 20

Handbook of the Law of Trusts, by Bogert, Chapter 20, §170, page 642 19

Handbook of the Law of Trusts, Supra., Chapter 20, §157, page 562 20

Restatement Second of Trusts, §205, Chapter 7, page 458 20

CITATIONS OF REPORTS

Order of March 12, 1999 entered by the Seventh Circuit Court of Appeals, Case Number 98-2437 in the matter of *James Spangler, Donald Melcher, Wayne J. Bielefeldt, et al. v. Altec International Limited Partnership, Chart Industries, Incorporated, and Altec International Limited Partnership Pension Plan and Trust for Hourly Employees*

Judgment of February 9, 1999 entered by the Seventh Circuit Court of Appeals, Case Number 98-2437 in the matter of the *James Spangler, Donald Melcher, Wayne J. Bielefeldt, et al. v. Altec International Limited Partnership, Chart Industries, Incorporated, and Altec International Limited Partnership Pension Plan and Trust for Hourly Employees*

PETITION FOR WRIT OF CERTIORARI

James Spangler, Donald Melcher, Wayne J. Bielefeldt, et al. (collectively referred to as "Spangler") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit on February 9, 1999, because (1) the court of appeals decision conflicts with decisions of the United States Supreme Court and with other United States Court of Appeals decisions on the same important matter; (2) the decision has departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power, all within the meaning of Sup. Ct. R. 10(a) and (c).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit that gives rise to this petition was filed on February 9, 1999. It is reprinted in the appendix hereto at App. A at App. 1 - App. 9. By order filed March 12, 1999, the Seventh Circuit denied a petition for rehearing. App. B at App. 10 - App. 11. The appeal to the United States Court of Appeals was from an opinion and order in the United States District Court for the Western District of Wisconsin dated April 13, 1998. The defendants opposed the court's retention of supplemental jurisdiction over remaining state law claims which was granted in an opinion and order dated May 11, 1998. Judgment was entered on May 12, 1998. The opinion and order granting summary judgment and the opinion and order and judgment granting defendants' motion opposing the court's retention of supplemental jurisdiction over remaining state law claims are reprinted in the appendix hereto at App. C at App. 12 - App. 23, App. D at App. 24 - App. 29.

JURISDICTION

On April 13, 1998 the United States District Court for the Western District of Wisconsin issued an opinion and order dismissing Spangler's complaint. On May 11, 1998 the district court granted defendants' motion opposing the court's retention of supplemental jurisdiction over remaining state law claims. Judgment was entered on May 12, 1998. Spangler timely appealed to the Seventh Circuit, which affirmed in an order and judgment filed February 9, 1999. On February 23, 1999, the Seventh Circuit accepted Spangler's petition for rehearing which was denied on March 12, 1999. This petition is being filed within ninety days of

the order and judgment dated February 9, 1999, as provided by Sup. Ct. R. 13(1).

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUES AND FEDERAL RULES INVOLVED IN THIS CASE

29 U.S.C. § 1113

STATEMENT OF THE CASE

A. Statement of Facts

The Plaintiffs are a mix of eighteen past and present employees of Altec International Limited Partnership, f/k/a Albraze, which is owned or controlled by Chart Industries, Inc., and Arthur Holmes (hereinafter collectively referred to as "Altec"). Mr. Holmes is a principle in Altec. Plaintiffs brought this action alleging violations of Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 832, as amended, 29 U.S.C. §1001 *et seq.*, federal common law arising thereunder, and certain state laws. Prior to Altec, Plaintiffs were employed by Trane Company (hereinafter "Trane") as skilled welders at its brazed aluminum manufacturing plant known as plant three. (App. F at App. 33 - App. 34.)

In or about late 1985 and early 1986 Trane desired to sell its brazed aluminum operations. During this time, various meetings were held with Trane employees, including the plaintiffs, regarding Altec's purchase of Trane's brazed aluminum operations and the resulting effect on the existing

employees, including the plaintiffs (hereinafter the "Meetings"). (App. F at App. 34.)

Altec needed experienced, skilled welders like the plaintiffs in order to continue the plant three operations and to train a new generation of welders. Altec was unable to recruit highly skilled welders such as the Plaintiffs elsewhere. (App. F at App. 34.)

The work of the plaintiffs as welders involved highly specialized training and skills for performing internal repair of brazed aluminum heat exchangers. Very few companies in the world manufacture such units and the plaintiffs would be sent around the globe to make on-site repairs. (App. F at App. 34.)

Plaintiffs were concerned about transferring to Altec. They had many years of service and seniority at Trane and did not want to lose the benefits that they would have had at Trane on their retirement from Trane. At the Meetings, the plaintiffs raised concerns whether, upon retirement, they would lose benefits in comparison to remaining with Trane. (App. F at App. 34 - App. 35.)

At the Meetings, George Snapp, Jr., (Altec's representative) employed in management at plant three and who was to continue in such a capacity for Altec, said that the goal was to see most of the plant three employees transfer to Altec. Snapp explained that said employees, including the plaintiffs, were critical to the success of Altec. Snapp promised that if the plaintiffs transferred to Altec, the transfer would not take anything away from the plaintiffs; specifically they were promised that they would not lose any benefits that they would have had if they had remained with

Trane. (App. F at App. 35.)

Also at the Meetings, Arthur Holmes, of Altec, told the plaintiffs that he would be unable to buy Trane's brazed aluminum operation unless the employees transferred to Altec. Holmes further assured the plaintiffs that should they transfer to Altec, they would have nothing to fear because they would not lose any benefits, and it was going to be just like continuing to work for Tra e. (App. F at App. 35.)

At one of the Meetings, the employees present at the meeting were shown by Altec a comparison of benefits between those at Trane and those they would receive if they transferred employment to Altec. (App. F at App. 35.)

On a number of occasions, Holmes walked around the plant three floor encouraging employees, including the plaintiffs, to transfer their employment to Altec. Snapp also walked around the plant floor on numerous occasions telling the employees that they had nothing to worry about by transferring to Altec because they would not lose any of the benefits from their years working for Trane. (App. F at App. 35 - App. 36.)

Relying on the above promises of Altec and the comparison of benefits between Trane and Altec, the employees decided to transfer to Altec. (App. F at App. 36.) Petitioners-employees were assured by Altec in 1985 and 1986 that they would not lose any Trane benefits that they would have had at Trane on their retirement from Trane. It was represented that the employees' benefits would not change from the Trane benefits. (App. F at App. 35 - App. 36.)

Altec did, in 1986, distribute documents to the employees that showed Altec employee benefits calculations. While the documents presented by Altec stated the retirement formula for others who would be hired as Altec employees, Altec assured the plaintiffs that in consideration for their leaving Trane, Altec would make up the difference between what they would receive under the Altec formula and what they would have received if they had remained at Trane. These documents did not in any way indicate that the benefit calculations and information from the documents applied to the plaintiffs as former Trane employees. See Defendants' Brief. (App. H at App. 73 - App. 74.) Based upon the representations made by Altec, the petitioners-employees had no basis to believe that the pension calculations in the documents served any purpose other than as a comparison between what non-former Trane employees would receive versus what the employees who transferred from Trane would receive from Altec. Thus, these documents do not provide petitioners-employees any basis to believe that the benefits they were to receive would be anything different than from the benefits previously promised to them by the Altec officials in 1985 and 1986.

In October of 1994, plaintiff James Spangler (hereinafter "Spangler") spoke to fellow employee and plaintiff Oswald Klomsten (hereinafter "Klomsten") regarding Klomsten's intent to retire. Klomsten requested that Altec calculate his anticipated pension benefits. (App. F at App. 36.)

Based on the information given them by Altec, Spangler and Klomsten first learned Altec was calculating Klomsten's pension benefits wrong in that his combined Trane and Altec pensions totaled an amount less than the

pension he would have received had he worked continuously at Trane over the same number of combined years. Klomsten was not receiving the promised benefits he would have received if he had stayed at Trane. (App. F at App. 36.)

On March 17, 1995, Spangler met with Arthur Holmes regarding Altec's refusal to pay the benefits Altec promised. Holmes refused to take any action to rectify the situation. (App. F at App. 36 - App. 37.)

Spangler subsequently discussed his concerns with several fellow Altec employees and was informed by each of them that they too were told that transferring their employment from Trane to Altec would not result in the loss of any benefits, including pension benefits, in comparison to the benefits they would receive had they worked for Trane continuously for the same number of years as their combined Trane and Altec service. (App. F at App. 37.)

As a result of Altec's failure to pay as promised, the Plaintiffs have suffered a loss of pension, health care, and vacation benefits. (App. F at App. 37.)

Two years and seven months after Altec's initial failure to pay as promised, and after Plaintiffs' first knowledge of Altec's breach, Plaintiffs commenced this action on May 13, 1997. The plaintiffs filed their complaint with claims for breach of fiduciary duty under ERISA §502(a)(3), to declare and enforce rights under certain employee benefit plans pursuant to ERISA §502(a)(1)(B), ERISA federal common law for estoppel, and alternative claims for fraudulent representations under Wis. Stat. §100.18, and breach of a contract under state law.

This action was commenced in the United States District Court for the Western District of Wisconsin on May 13, 1997. An amended complaint was filed on October 3, 1997. The claims included causes of action for breach of fiduciary duty under ERISA §502(a)(3); the action also sought to declare and enforce plaintiffs-petitioners' rights under certain employee benefit plans pursuant to ERISA §502(a)(1)(B). Claims also included causes of action for ERISA federal common law for estoppel, and alternative claims for fraudulent representations under Wis. Stat. §100.18, and breach of contract under state law. (App. G at App. 49 - App. 70.)

On February 12, 1998, defendants moved for partial summary judgement requesting the dismissal of all claims except those for vacation benefits. After submission of briefs, affidavits and other supporting documents by both sides, the district court granted defendants motion on April 13, 1998 dismissing plaintiffs' federal claims. The district court did so on the basis that the statute of limitations had run before the commencement of this action. (App. C at App. 12 - App. 23.)

On May 11, 1998, the district court rendered its opinion and order that the district would relinquish its jurisdiction of plaintiffs' remaining state law claims and dismissed the claims without prejudice. On May 12, 1998, Judgement of dismissal was entered. (App. D at App. 24 - App. 29.)

The plaintiffs filed their notice of appeal on June 8, 1998.

In the appeal to the Seventh Circuit, petitioners-

employees argued, pursuant to the application of 29 U.S.C. 1113(1)(A), this last act constituting a breach could not have occurred prior to the time when Altec first denied pension benefits by issuing benefit checks of less than what had been previously promised. This occurred in October 1994.

Similarly, petitioners-employees argued that as the first performance in accordance with the prior representations made by Altec in 1985 and 1986 did not occur until 1994 and considering the fact that petitioners-employees had no notice, whatsoever, of any actual or anticipated breach or failure to perform in accordance with the fiduciary duties established by the 1985 and 1986 representations of Altec, until 1994 and considering the fact that the action was filed on the 13th day of May, 1997 (two years seven months from the first notice) the action could not be barred by the applicable statute of limitations. (App. F at App. 31 - App. 49.)

Nevertheless, the Court of Appeals in its judgment of February 9, 1999 concluded that any breach of fiduciary duty in violation of ERISA by Altec occurred when the employees accepted employment with Altec between approximately the time frame of 1986 and 1988 and thus, the action was untimely and barred by the statute of limitations. In reaching this decision, the Court of Appeals, while noting that there was "no case law on the application of ERISA § 413's six year statute of limitations to what we will refer to as a *Varity* breach of fiduciary duty claim" the Court of Appeals for guidance then looked to the law of intentional misrepresentation. From this, the Court of Appeals determined that a misrepresentation cause of action becomes viable when there is action in reliance upon the representations. Thus, by applying this logic, the Court of

Appeals determined that the actions in reliance upon the subject Altec's representations and/or misrepresentation occurred in the approximate time frame from 1986 to 1988 and thus the statute of limitations had run before suit was commenced herein. (App. A at App. 1 - App. 9.)

However, the Court of Appeals did not address the fact that no performance was required pursuant to the 1985 and 1986 representations until 1994 and thus, until there was a failure to perform, in these circumstances, there could be no breach of a fiduciary duty (nor notice of a breach) and in fact, petitioners-employees would not even have a claim for breach of fiduciary duty or for misrepresentation against Altec until there was both a breach and until a harm had occurred. Until the payments that should have been made were not made, plaintiffs had suffered no damage; nor did they have any basis for anticipating that they would suffer any damages.

In addition, the Court of Appeals failed to consider the momentous ramifications of its decision. Applying its decision, petitioners-employees literally lost their rights to bring an action (pursuant to the Court of Appeals' logic) before petitioners had suffered any harm, or before petitioners even had any notice, whatsoever, of any breach or of any harm.

Although it was argued to the Court of Appeals, the Court of Appeals disregarded the fact that although the representations made by Altec to petitioners were made in 1985 and 1986, the petitioners-employees had no knowledge or notice whatsoever of any breach or failure to perform in accordance with these promises until late 1994. Under the Court of Appeals' analysis in its decision, petitioners-

employees cause of action ran in 1992, over two years before any petitioners-employees had any notice that there had been, or would possibly be, a breach of any duty by Altec. It was also two years before there was any failure to perform Altec's promised fiduciary duties. Nevertheless, under the Court of Appeals' analysis in this case, the petitioners-employees lost their right to bring this action before they had any basis to conclude that their right to bring this existed and existed before they knew they would suffer any harm. (App. A at App. 1 - App. 9.)

These facts were again brought to the Court of Appeals' attention in a Petition for Rehearing which was filed on February 23, 1999. (App. I at App. 75 - App. 87.) The Court of Appeals, on March 12, 1999, denied said Petition for Rehearing. (App. B at App. 10 - App. 11.)

B. Basis for Federal Jurisdiction

The district court had federal jurisdiction under 28 U.S.C. § 1331.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals Conflicts With the Decisions of Other Courts and Is Inconsistent With Determinations by the Supreme Court.

When one considers the facts of the present case, in view of the decision of the United States Supreme Court in *Varity Corp. v. Howe*, 516 U.S. 489, 116 S.Ct. 1965, 134 L.Ed.2d 130 (1996) and in view of the federal case law as will hereinafter be cited in this section, it is clear that under the facts of this case, the Court of Appeals erred when it stated that:

> "There is no case law on the application of ERISA §413's six year statute of limitations as to what we will refer to as a *Varity* breach of fiduciary duty claim. . ."

(App. A at App. 6.)

After reaching this erroneous conclusion, the Court of Appeals then went on to determine that under the facts of the case, the statute of limitations ran at least two years before any petitioners-employees had any notice of any potential breach of fiduciary duty and at least two years before any required performance was required of the fiduciary to act in accord with the prior representations made. However, in this regard, the Court of Appeals' decision, in fact, conflicts with federal case law and is inconsistent with the Supreme Court's decision in *Varity Corp. v. Howe*, Supra.

As indicated in the factual background, plaintiffs-petitioners are a number of former employees of the Trane

Company who in 1985 and 1986 were induced to leave the Trane Company and join Altec. Among the representations made by the Altec officials to induce the Trane Company employees to join Altec, were specific representations and promises that the Trane Company employees would lose no benefits, including pension benefits. It was represented that if the employees joined Altec, their pension benefits would be the same as if they had stayed with Trane Company. In view of representations such as these, the plaintiffs-petitioners left the Trane Company and joined Altec in 1985 and 1986. It is plaintiffs-petitioners' contention that the representations made in 1985 and 1986 by the Altec officials created a fiduciary duty on behalf of the Altec officials to act in accordance with the representations made. For purposes of the issues on appeal, this is undisputed.

However, it was not until October 1994, when one of the plaintiffs-petitioners, requested that Altec calculate pension benefits because of a pending retirement, that the plaintiffs-petitioners learned that Altec would not perform in accordance with its fiduciary duties as established by its prior representations. Until this time, none of the plaintiffs-petitioners herein had any knowledge or notice of **any** such breach or intended breach of fiduciary duty by Altec.

Nevertheless, despite the above fact, the Court of Appeals determined that as plaintiffs-petitioners had acted in reliance upon the representations made by joining Altec in 1985 and 1986, those actions of joining Altec triggered the running of the ERISA statute of limitations as set forth in 29 U.S.C. § 1113(1)(A) and determined that:

> "The last action which constituted a part of the breach 'occurs when the employee takes an irrevocable action or reliance on the fiduciary's representations.'"

(App. A at App. 7.)

The Court of Appeals determined that the six year period for the statute of limitation began to run in 1985 and 1986 and thus at the latest, such limitations ran in 1992, over two years before any plaintiff-petitioner had any knowledge or notice of a breach, or before any harm to plaintiffs-petitioners had occurred.

As demonstrated before, this logic and analysis of the Court of Appeals directly conflicts with federal case law.

A breach of fiduciary duty cause of action does not depend on whether or not the representations made were intended to be misrepresentations. Whether the 1985 or 1986 representations were misrepresentations is not determinative. The determinative issue is that the representations made in 1985 and 1986 created a fiduciary duty on the part of Altec to abide by and act in accordance with the representations made.

Accordingly, there could be no breach of a fiduciary duty until Altec, in fact, failed to perform in accordance with the promises made. This, the record clearly shows, did not occur until 1994. The Court of Appeals in determining that the breach occurred when the plaintiffs-petitioners acted in reliance upon the breach by joining Altec, disregarded the facts and the law. Plaintiffs-petitioners submit that case law, including *Varity Corp. v. Howe*, 516 U.S. 489, 116 S.Ct.

1065, 134 L.Ed.2d 130 (1996) supports plaintiffs-petitioners arguments herein and that the Court has misapprehended the law as set forth in *Varity*. In discussing the breach of fiduciary duty cause of action in ERISA cases, the Supreme Court in *Varity* specifically characterized "a denial of benefits as a breach of fiduciary duty," see *Varity* at 516 U.S. 514. It is thus evident that the Supreme Court recognized that a breach of fiduciary duty occurs when the denial of benefits occurs, **not** when the representations which created the duty were made.

To further understand this logic, consider the following hypothetical. Assume that in 1985 and 1986 the oral representations had been reduced formally to a written plan that was then given to the employees. Further assume that Altec, in 1994, began to pay benefits that conflicted with the written plan. Presumably, in such a case, the Court of Appeals would consider that in a breach of fiduciary duty claim, the cause of action would occur when the failure to perform occurred. The plan created the duty, and the duty was breached when there was a failure to perform. The plaintiffs-petitioners cause of action, herein, is not substantially different from this hypothetical.

The Court of Appeals in *Meagher v. International Association of Machinists and Aerospace Workers Pension Plan*, 856 F.2d 1418 (9th Cir. 1988) has applied similar logic. This case also addressed the application of the statute of limitations to a breach of fiduciary duty cause of action under ERISA; in doing so, *Meagher* held that the six-year statute of limitations provision pursuant to 29 U.S.C. §1113 began to run with the issuance of each check that was not in accordance with the benefits to which the Plaintiff was entitled. "Thus, the issuance of each check commenced a

six-year period. . ." See *Meagher* at 856 F.2d 1418, 1423. For similar holdings see also *Tolle v. Carroll Touch, Incorporated*, 977 F.2d 1129, 1139 (7th Cir. 1992).

In addition, the following quote from *Starr v. JCI Data Processing, Inc.*, 767 F.Supp. 633, 637-638 (N.J. 1991) is also in accord with the above discussed holdings and logic:

> In the absence of actual knowledge, § 1113 mandates application of a limitations period of six years after the date of the last action constituting part of the breach or, in the case of omission, the latest date on which the fiduciary could have cured the breach or violation. (For applications see, e.g., Davidson v. Cook, 567 F.Supp. 225, 234 (E.D.Va.1983), aff'd, 734 F.2d 10 (4th Cir.1984), cert. denied, Accardi v. Davidson, 469 U.S. 899, 105 S.Ct. 275, 83, L.Ed.2d 211 (1984) (last action was last disbursement of funds pursuant to loans made not in interest of plan beneficiaries); Buccino v. Continental Assur. Co., 578 F.Supp. 1518, 1521 (S.D.N.Y.1983) (last action was last time fund was injured by making premium payment due to fiduciaries' failure to advise fund to divest itself of unlawful or imprudent investments).) This language is unusually broad in allowing employees to pursue their claims in a timely fashion while hampering an employer's effort to hide behind a time bar. Thus, the language comports with Congress' intent in ERISA "'to remove jurisdictional and procedural obstacles which in the past appear to have

> hampered effective ... recovery of benefits due to participants.' " S.REP. NO. 127, 93d Cong., 1st Sess. 35 (1973), quoted in Connors v. Hallmark & Son Coal Co., 935 F.2d 336 (D.C.Cir.1991).

The Court of Appeals' decision here conflicts with the federal case law as above set forth.

By determining in the present case that the ERISA statute of limitations ran two years before plaintiffs-petitioners had any notice of the breach, the Court of Appeals' decision also conflicts with other federal case law on the issue of notice. As stated in *Ziegler v. Connecticut General Life Insurance Company*, 916 F2d 548, 552 (9th Cir. 1990):

> We stress that an ERISA plaintiff's cause of action cannot accrue and the statute of limitations cannot begin to run until the plaintiff has actual knowledge of the breach, regardless of when the breach actually occurred. The ERISA statute of limitations, 29 U.S.C. § 1113, requires satisfaction of this second prerequisite, the plaintiff's actual knowledge of the breach, before the statute can begin to run. (Emphasis added.)

The Court of Appeals' decision herein conflicts the body of case law that holds that a breach of fiduciary duty cause of action **cannot** accrue until the aggrieved parties have knowledge of the breach. Further, the decision conflicts the body of law that holds that for statute of limitation purposes the last act constituting a breach of

fiduciary duty is when the fiduciary fails to act in accordances with the promised duties.

II. The Decision of the Court of Appeals Departs From the Usual Course of Judicial Proceedings and Is Inconsistent With Long Established Legal Principles so as to Call for an Exercise of This Court's Supervisory Power.

The Court of Appeals herein determined that there was no case law that addressed the application of ERISA's six year statute of limitations for *Varity* breaches of fiduciary duty claims and thus looked, by analogy, to the law on intentional misrepresentation to determine when an intentional misrepresentation cause of action would accrue so as to trigger the running of the statute of limitations. (App. A at App. 6 - App. 8.) In applying this mistaken analysis, the Court of Appeals determined that the triggering events starting the statute of limitations period running was when the petitioners-plaintiffs-employees acted in reliance upon the fiduciary's representations. However, this logic, and this analysis, is contrary to long recognized legal principles.

In discussing breach of fiduciary duty claims under ERISA, the Supreme Court in *Varity* recognized

> "that these fiduciary duties draw much of their content from the common law of trusts, the law that governed most benefit plans before ERISA's enactment."

See *Varity* at 516 U.S. pg. 496. Further, on the same page, the Supreme Court goes on to note that when Congress

enacted the ERISA legislation, rather than

> "explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility."

See *Varity*, Supra.

It is fundamental trust law (contrary to the Court of Appeals' analysis) that a cause of action cannot accrue or the statute of limitations cannot begin to run until there has either been harm or knowledge of the breach.

> When the trustee violates any of his obligations under the trust, or denies the trust, repudiates all of his duties under it, and claims the trust property as his own, then a cause of action arises in favor of the beneficiary and the Statute of Limitations starts to run. It is well settled that in express trusts, and as between beneficiary and trustee, the Statute of Limitations runs from the date when the beneficiary knows or should by the use of ordinary care have known of a breach or a repudiation of the trust by the trustee. See *Handbook of the Law of Trusts* by Bogert, Chapter 20, § 170, page 642.

> Similarly,

> "A trustee is liable in damages for losses to the beneficiaries caused by a breach of trust.

> The cause of action may be enforced by the beneficiaries or by a successor trustee."

See *Handbook of the Law of Trusts*, Supra., Chapter 20, §157, page 562.

Further, §205 of the *Restatement Second of Trusts*, provides, in part, as follows:

> §205. Liability in Case of Breach of Trust
>
> If the trustee commits a breach of trust, he is chargeable with
>
> (a) any loss or depreciation in value of the trust estate resulting from the breach of trust;

Restatement Second of Trusts, §205, page 458.

Implicit from the above quotes from the *Restatement Second of Trusts* and from §157 of the *Handbook of the Law of Trusts* is that for there to be a cause of action for breach of trust, there first must be a loss. A breach of trust cause of action cannot exist without such a loss.

Also relevant is the following quote from 37 C.J.S. *Fraud* §7 Breach of Fiduciary Duty, page 183, which states as follows:

> The elements of a cause of action for participation in a breach of fiduciary duty are: breach by the fiduciary of a duty owed to plaintiff; defendant's knowing participation in

the breach; **and damages**. (Emphasis added.)

The Court of Appeals' decision departs from these basic principles from the law of trusts, and thus, under *Varity*, from the law of breaches of ERISA breach of fiduciary duties.

Nevertheless, even if one applies an intentional misrepresentation analysis, however, the Court of Appeals in its decision has departed from the usual course of judicial proceedings and its decision is inconsistent with long established legal principles.

The United States Supreme Court has recognized that in common law, with a cause of action based upon fraud both "intent and injury have been deemed the essential elements in a damage suit. . ." see *Securities & E. Commission v. Capital Gains Research Bureau*, 375 U.S. 180, 192, 84 S.Ct. 275, 283, 11 L.Ed.2d 237, 247 (1963).

Espousing similar general legal principles, are the following:

> "However, because damages are a central element of a fraud action..." See 37 C.J.S. *Fraud* §93, page 297.
>
> "Fraud without damage or injury is not remediable..." See 37 C.J.S. *Fraud* §50, page 238.
>
> "Generally speaking, plaintiffs may recover when he shows that he has sustained some pecuniary damage or injury..." See 37 C.J.S.

Fraud §51, page 239.

Many cases have also recognized damages as a necessary element for a fraud cause of action. As an example, see *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 279 (2nd Cir. 1992).

From the above discussion, it is evident that the Court of Appeals' subject decision has significantly departed from accepted and long established legal principles.

Despite the Court of Appeals' holding, a cause of action for breach of fiduciary duty does **not** occur when a party acts in reliance on the representations made. The cause of action occurs when harm occurs or when knowledge of the harm occurs. Therefore, because of the Court of Appeals' departure from long established legal principles and due to the powerful inequitable ramifications of the decision, it is necessary that the Supreme Court clarify how the ERISA statute of limitations will apply to such breach of fiduciary duty claims; it is necessary for the Supreme Court to step in and clarify this issue for all future litigants.

III. The Court of Appeals' Failed to Consider the Inequitable Effects of Its Holding on Petitioners-Plaintiffs and Others.

As noted in *Starr v. JCI Data Processing, Inc.* at 767 F.Supp. 633, 638:

> "... Congress' intent in ERISA "[is] 'to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective ... recovery of benefits due

> to participants.' " S.REP. NO. 127, 93d Cong., 1st Sess. 35 (1973), quoted in Connors v. Hallmark & Son Coal Co., 935 F.2d 336 (D.C.Cir.1991)."

From this, it is clear that one policy goal of ERISA is to remove the hurdles that have prevented employee and benefit plan litigants from enforcing their rights to pension and other benefits.

Plaintiffs-petitioners respectfully submit that despite this policy, the ultimate effect of the Court's decision in this case is to permit employers and benefit plan administrators to make representations and promises to employees and plan participants as to the nature and extent of benefits and yet not abide by those promises if six years pass and if in the interim, the employees could not learn that there will not be performance in accordance with the representations made. Under the Court's holding, if six years have passed since the time of the representations, regardless of the circumstances, the participants, the innocent victims, would be left with no recourse despite the fact that they had no knowledge until the time the benefits actually accrued and performance was required. The effect is that the plan participants such as the plaintiffs-petitioners in the present case have forever lost their right to bring an action even before they suffered damage and before they knew there was a right to pursue. This is in direct contravention of the above espoused ERISA policy.

This holding therefore has potentially momentous ramifications, not only to the parties in the present case, but to any and all other plan participants who might be victims of *Varity* type breaches of fiduciary duties. The earliest any

participant in this case was aware that any wrong had, or would, occur to them in violation of Altec's fiduciary duties to plaintiffs-petitioners was in 1994. If they were not aware of the wrong that occurred, or that would occur, they surely would not be aware that there was any basis to bring a claim to enforce their rights. If this decision is not reviewed, employees can lose their remedy before they realize they need it. The patent unfairness and inequity of this cannot be understated, particularly in view of the policy set forth above.

In view of this unfairness and the fact that the Court of Appeals' decision conflicts with other Federal Court holdings which require a breach or, at least, the knowledge that there will be a breach, before an ERISA breach of fiduciary duty cause of action can accrue, it is requested that the Supreme Court exercise its supervisory power to intervene and clarify the law on this important issue for potentially all litigants who seek to enforce ERISA breach of fiduciary duty claims.

CONCLUSION

The petitioners' case is yet to be fairly heard. For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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FILED

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OFFICE OF THE CLERK

No.

In the
Supreme Court of the United States

OCTOBER TERM 1999

JAMES SPANGLER, DONALD MELCHER, WAYNE J. BIELEFELDT, ET AL.,
Petitioners,

v.

ALTEC INTERNATIONAL LIMITED PARTNERSHIP, CHART INDUSTRIES, INC. and ALTEC INTERNATIONAL LIMITED PARTNERSHIP PENSION PLAN AND TRUST FOR HOURLY EMPLOYEES,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

APPENDIX A: Opinion of Seventh Circuit affirming the District Court ..... App. 1

APPENDIX B: Order of the Seventh Circuit denying petition for rehearing ..... App. 10

APPENDIX C: Opinion and Order of District Court granting summary judgment ..... App. 12

APPENDIX D: Opinion and Order of District Court granting Defendants' motion opposing Court's retention of supplemental jurisdiction ..... App. 24

APPENDIX E: Judgment of the District Court ..... App. 29

APPENDIX F: Seventh Circuit Brief of the plaintiffs-appellants ..... App. 31

APPENDIX G: Amended Complaint ..... App. 49

APPENDIX H: Excerpts from Seventh Circuit Brief of Defendants-Appellees ..... App. 71

APPENDIX I: Petition for Rehearing ..... App. 75

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 98-2437

JAMES SPANGLER,
DONALD MELCHER,
WAYNE J. BIELEFELDT, *et al.*,

Plaintiffs - Appellants

v.

ALTEC INTERNATIONAL
LIMITED PARTNERSHIP,
CHART INDUSTRIES,
INCORPORATED, and
ALTEC INTERNATIONAL
LIMITED PARTNERSHIP
PENSION PLAN AND
TRUST FOR HOURLY
EMPLOYEES,

Defendants - Appellees

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 97 C 338 – **Barbara B. Crabb**, *Judge*

App. 2

ARGUED DECEMBER 16, 1998
DECIDED FEBRUARY 9, 1999

Before ESCHBACH, COFFEY and MANION, *Circuit Judges.*

ORDER

A group of current and former Altec International employees sued Altec International and associated parties, alleging, in part, that Altec representatives had, in violation of the Employee Retirement Income Security Act ("ERISA"), misrepresented how the employees' pension benefits would be calculated if they came to work for Altec. The district court ruled that ERISA's statute of limitations barred these claims. The employees now appeal. We conclude that the asserted ERISA violation occurred, if at all, when the employees accepted employment with Altec, thus making the employees' claims untimely. Therefore, we affirm.

Background

The plaintiffs-appellants are eighteen former and current employees of Altec International Limited Partnership, formerly known as Albraze, which is owned or controlled by Chart Industries, Inc., and Arthur Holmes (collectively, "Altec"). Prior to working for Altec, each of the employees worked for Trane Co. in its brazed aluminum manufacturing plant. In 1986, Trane sold this plant to two individuals affiliated with Chart Industries and Altec, and agreed to "loan" the plant's employees to Altec for two years, which meant they would return to Trane with full

seniority and benefits.

While the sale was still being negotiated, representatives of Altec began attempting to persuade the employees of the brazed aluminum plant to leave their jobs at Trane and permanently join Altec when it purchased the plant. In 1985 and 1986, Altec representatives assured the employees that they would "not lose anything" from their Trane benefits. They spoke to the employees and distributed documents comparing Trane's and Altec's benefits. According to the employees, on several occasions Altec representatives went so far as to promise them that they would not lose any benefits to which they would have been entitled had they remained with Trane. Eighteen employees transferred to Altec between 1986 and 1988.

The benefits to which Altec said these employees were entitled fell short of the employees' expectations. Upon retirement, the former Trane employees would be entitled to a Trane pension based on their years at Trane (those pensions had already vested by the time they left) and an Altec pension based on their years at Altec. It turns out that these two pensions are not equivalent to a single Altec pension[1] based on the total number of years worked for both companies. The disparity arises primarily because the pension multiplier (monthly benefit per year worked) on the Trane pensions was frozen at $16 or $17 (depending on when the employee transferred), while pension multipliers applied to the total time served at Altec (as of 1990) have increased to $25. The employees believe that Altec should

---

[1]Nor presumably to a single Trane pension. The record, however, contains no indication of what the employees would have received had they stayed at Trane.

supplement their Trane pensions to cover the difference. Altec, however, has not included the employees' time with Trane in its calculation of the employees' years of service for purposes of their Altec pensions.

In 1986, Altec distributed documents to its employees (including those formerly employed by Trane) detailing how their pension benefits would be calculated, which made clear that only years worked for Altec would be used in calculating pension benefits. Nevertheless, the employees claim that not until October 1994 did they realize that they would be getting less than they expected. In May of 1997, the employees filed suit alleging various claims under state law, federal common law, and ERISA.

On Altec's motion for summary judgment, the district court found that ERISA preempted the employees' state law claims of fraudulent representation, breach of contract, intentional misrepresentation, negligent misrepresentation, and strict responsibility misrepresentation. The court, however, declined to grant summary judgment on the employees' remaining state law claims for vacation pay, although the court later relinquished jurisdiction over that set of claims. As for the federal claims, the court concluded that the employees' federal estoppel and denial of benefits claims had no merit because they were based on oral representations that contradicted the written terms of Altec's pension plan. Finally, the court held that ERISA's statute of limitations barred the employees' federal breach of fiduciary duty/intentional misrepresentation claims. The statute of limitations decision is the only issue on appeal.

Analysis

This court reviews a district court's grant of summary judgment de novo, construing the evidence and the inferences drawn from it in the light most favorable to the non-moving party. *See Curran v. Kwon*, 153 F.3d 481, 485 (7th Cir. 1998). Summary judgment is appropriate where there is no genuine issue of material fact such that judgment is proper as a matter of law. *See id.* (citing Fed. R. Civ. P. 56(c)).

Under ERISA, employers that administer pension plans are fiduciaries who owe a duty of loyalty to plan participants and beneficiaries. The Supreme Court has recognized that intentionally misrepresenting the nature of pension plan benefits is a breach of an employer's fiduciary duty, and therefore a violation of ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). *Varity Corp. v. Howe*, 516 U.S. 489 (1996). Claims asserting a breach of fiduciary duty are subject to ERISA's statute of limitations, which, in relevant part, provides that a claim is barred either six years after "the date of the last action which constituted a part of the breach," or three years after "the earliest date on which the plaintiff had actual knowledge of the breach," whichever occurs first. ERISA § 413, 29 U.S.C. § 1113.[2]

---

[2]ERISA § 413 reads:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of–
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or

(continued...)

The district court concluded that the "last action which constituted a part of the breach" occurred in 1985 or 1986 when the representations were made, and therefore, the employees' claims, filed in 1997, were untimely under ERISA § 413's six-year statute of limitations. On appeal, the employees' argue that Altec did not breach its fiduciary duty until it began to deny the former Trane employees benefits to which the employees believed they were entitled. The idea is that only when Altec actually failed to perform was the breach complete. According to this reasoning, the statute of limitations did not begin to run until at least October 1994, when the first former Trane employee retired.

Although there is no case law on the application of ERISA § 413's six-year statute of limitations to what we will refer to as a *Varity* breach of fiduciary duty claim, it is relatively clear that the employees' arguments are misguided. Intentional misrepresentation, which is the sole basis for the breach of fiduciary duty claim, is a tort action, not a contract action; thus, contrary to the employees' protestations, failure to perform is not a necessary element of the cause of action. A plaintiff alleging intentional misrepresentation has a viable cause of action when he or she acts in reliance on the

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[2](...continued)

> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1113 (1994). The employees do not argue that this case involves an omission, and they concede that the case does not involve fraud or concealment.

defendant's misleading statements. *See Librizzi v. Children's Mem'l Med. Ctr.*, 134 F.3d 1302, 1307 (7th Cir. 1997) (suggesting this possibility in dicta). The timing of the injury caused by such representations is irrelevant. In analogous ERISA cases, courts have uniformly recognized that the fact that an injury may not be felt for many years does not mean that a violation or breach has not yet occurred. *See id.* At 1306 ("An adverse decision whose effect is deferred gives rise to a claim when the decision is made, not when the effect is felt."); *Larson v. Northrop Corp.*, 21 F.3d 1164, 1169-72 (D.C. Cir. 1994) (holding that breach of fiduciary duty under ERISA was complete when defendant illegally terminated pension plan, rather than when defendant failed to pay benefits); *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1178 (3d Cir. 1992) (holding that last act constituting a breach of fiduciary duty under ERISA occurred when defendant illegally amended pension plan, rather than when defendant failed to pay benefits); *International Union of Elec., Elec., Salaried, Mach. & Furniture Workers v. Murata Erie N. Am., Inc.*, 980 F.2d 889, 898-900 (3d Cir. 1992) (same). *See also Wolin v. Smith Barney Inc.*, 83 F.3d 847, 854-55 (7th Cir. 1996) (discussing the relationship between discovery of breach and discovery of injury under ERISA). It is likewise clear that ERISA § 413's six-year statute of limitations begins to run when the violation or breach occurs, regardless of when the injury is felt. *See Larson*, 21 F.3d at 1169-72; *Gluck*, 960 F.2d at 1178; *Murata*, 980 F.2d at 898-900.

Accordingly, in a *Varity*-type breach of fiduciary duty situation, the "last action which constituted a part of the breach" occurs when the employee takes an irrevocable action in reliance on the fiduciary's misrepresentations. The district court's opinion suggests, to the contrary, that the last

act of misrepresentation is the correct starting point. Actual inducement, however, is typically considered an element of intentional misrepresentation. W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* 728 (West, 5th Lawyers ed., 1984). Moreover, a plaintiff has no injury until he detrimentally relies on the misrepresentations, and therefore, and ERISA cause of action would accrue only upon such reliance. Applying ERISA § 413 in this manner, the statute of limitations began to run for each employee's *Varity* claim on the day he agreed to transfer from Trane to Altec. Because the last transfer occurred in 1998, ERISA § 413 bars all of the employees' *Varity* claims.

While the employees insist that they are pursuing only their *Varity* claims on appeal, they repeatedly suggest that the alleged misrepresentations were originally promises that gave rise to a contractual right, the breach of which was not complete until Altec failed to pay according to the employees' expectations. As noted above, however, a *Varity* claim is a tort-based claim not a contract-based claim, and therefore, the existence or non-existence of a contractual right has no bearing on the employees' *Varity* claims. To the extent that the employees' are arguing that Altec is liable under ERISA for failing to perform on its promises, they are actually taking issue with the district court's dismissal of their ERISA § 502(a)(1)(B) denial of benefits claims - a decision they did not appeal. The district court, in any event, correctly dismissed those claims because an oral representation that conflicts with the terms of a written plan has no effect. *See Schmidt v. Sheet Metal Workers' Nat'l Pension Fund*, 128 F.3d 541, 546 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 1513 (1998). Altec's written plan, distributed to its employees in 1986, makes no mention of an exception for former Trane employees; and thus is in conflict

with the alleged oral promises. Accordingly, the employees cannot base a claim for the denial of benefits on those promises.

In sum, we conclude that ERISA's statute of limitations bars the employees' breach of fiduciary duty claims. Thus, we AFFIRM the district court's ruling.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

No. 98-2437

JAMES SPANGLER,
DONALD MELCHER,
WAYNE J. BIELEFELDT, *et al.*,

Plaintiffs - Appellants

v.

ALTEC INTERNATIONAL
LIMITED PARTNERSHIP,
CHART INDUSTRIES,
INCORPORATED, and
ALTEC INTERNATIONAL
LIMITED PARTNERSHIP
PENSION PLAN AND
TRUST FOR HOURLY
EMPLOYEES,

Defendants - Appellees

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 97 C 338 – **Barbara B. Crabb**, *Judge*

March 12, 1999

Before ESCHBACH, COFFEY and MANION,
Circuit Judges.

ORDER

On February 23, 1999 the plaintiffs-appellants filed a petition for rehearing. All of the judges on the original panel having voted to deny the petition,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

JAMES SPANGLER, DONALD MELCHER, WAYNE J. BIELEFELDT, DALE CHRISTIANSON, ROBERT CLARK, HAROLD DANIELSON, DENNIS A. GERKE, DAVID GOODE, KEITH HUBER, WILLIAM HUTSCHENREUTER, RAY JANISCH, OSWALD A. KLOMSTEN, JERRY MUNYON, EMIL D. POTARACKE, RODERICK SAND, GORDON STENSLIEN, STANLEY STUGEN, and ROBERT TAYLOR,

Plaintiffs,

v.

ALTEC INTERNATIONAL LIMITED PARTNERSHIP, a domestic limited partnership, CHART INDUSTRIES, INC., a Delaware Corporation, and ALTEC INTERNATIONAL LIMITED PARTNERSHIP PENSION PLAN AND TRUST FOR HOURLY EMPLOYEES,

Defendants.

OPINION AND ORDER

97-C-338-C

Plaintiffs are current and former employees of defendant ALTEC International Limited Partnership. In this civil action, plaintiffs contend that defendant ALTEC and defendant Chart Industries, Inc., breached promises made to plaintiffs and made misrepresentations concerning the employee benefits to which plaintiffs would be entitled if they agreed to leave Trane Company and work for Chart. Plaintiffs seek money damages under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461, federal common law and Wisconsin statutory and common law. Jurisdiction is present pursuant to 29 U.S.C. § 1132(f) and 28 U.S.C. § 1331.

The case is before the court on defendants' motion for partial summary judgment on all claims asserted by plaintiffs, with the exception of the vacation pay claims of plaintiffs Goode, Christianson and Huber. Defendants assert that plaintiff's state law claims are preempted by ERISA and that plaintiffs' ERISA breach of fiduciary duty claim is barred by the act's statute of limitations. Furthermore, defendants contend that plaintiffs' estoppel and denial of benefits claims fail because they conflict with written documents describing the plaintiffs' pension plan. Finally, defendants maintain that all of plaintiffs' vacation pay claims, except those of plaintiffs Goode, Christianson and Huber, are barred by Wisconsin's six-year statute of limitations for breach of contract actions. Plaintiffs deny that all of their non-vacation pay claims are governed by ERISA and contend that the applicable limitations periods have not yet expired. Also, plaintiffs assert that their estoppel, denial of benefits and vacation pay claims are all viable.

Defendants' motion for partial summary judgment will be granted in part and denied in part. I find that

plaintiffs' state law claims are preempted by ERISA and that plaintiffs failed to file their ERISA claims within the act's statute of limitations. Plaintiffs' estoppel and denial of benefits claims are unsupported by either facts or law and must be denied. Finally, defendants are not entitled to summary judgment on plaintiffs' vacation pay claims because there is a genuine dispute whether these claims are barred under Wisconsin's six-year statute of limitations for breach of contract actions.

To prevail on a motion for summary judgment, the moving party must show that even when inferences are drawn in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1412 (7th Cir. 1989) (citations omitted). I note that defendants chose to disregard plaintiffs' proposed findings of fact, stating that the preliminary pretrial conference order made no provision for their submission. However, such a document is authorized by this court's standing rules and procedures for summary judgment motions. Therefore, all properly supported facts in plaintiffs' proposed findings of fact will be deemed admitted. For the sole purpose of deciding this motion for partial summary judgment, I find from the parties' proposed findings of fact that there is no genuine dispute with respect to the following material facts.

UNDISPUTED FACTS

Plaintiffs are current and former employees of defendant ALTEC who were employed previously by Trane Company. In 1986, the Trane plant in which plaintiffs

worked was sold to two individuals affiliated with defendant Chart Industries, Inc., and its subsidiary, defendant ALTEC, then known as ALBRAZE, International, Inc.

Plaintiffs left their jobs at Trane to join defendant ALTEC in reliance on ALTEC's promise that they would "not lose anything" from their Trane benefits. Representatives of defendant ALTEC made these assurances in 1985 and 1986.

When plaintiffs accepted employment with defendant ALTEC, their interests in their existing Trane pensions were completely vested. However, because plaintiffs resigned from Trane, their previous years of service with Trane are not included in the years of service to which the pension multiplier is applied at the time of retirement for their ALTEC pensions. In 1985 and 1986, representatives of defendant ALTEC told some of the plaintiffs that ALTEC would pay plaintiffs, upon retirement, the difference between their Trane and ALTEC pensions and the amount they would have received had they stayed at Trane.

In 1986, defendant ALTEC distributed certain documents regarding its benefits program to some of the plaintiffs. These documents described how plaintiffs' pensions from ALTEC would be calculated. Defendant ALTEC did not withhold any of the documents from any of the plaintiffs.

By 1989, plaintiffs, Gerke, Clark, Taylor and Sand knew that their vacation benefits at defendant ALTEC were different from what they would have received had they continued their employment with Trane.

In 1994, plaintiffs began to suspect that their total pension benefits would be less than they had expected. Upon plaintiff Spangler's inquiry, he received a letter in 1995 from a union representative that explained the method of calculation for his pension benefits. This letter referred to a memorandum that allegedly had been given to plaintiffs by defendant ALTEC in 1986. Plaintiffs deny ever seeing the second page of the memorandum, which described how their total pension benefits would be calculated upon retirement.

OPINION

A. ERISA Preemption of State Law Claims

Section 514(a) of ERISA, 29 U.S.C. § 1144(a), preempts any state law claim that relates to a pension plan. See Anderson v. Humana, Inc., 24 F.3d 889, 891 (7th Cir. 1994) (citing District of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125 (1992); Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983)); see also Andersen v. Chrysler Corp., 99 F.3d 846, 856 (7th Cir. 1996) (citations omitted). A state law claim "relates to" a pension plan "if it has a connection with or reference to such plan." Shaw, 463 U.S. at 96-97. ERISA's board preemption clause establishes pension plan regulation exclusively as a federal concern and ensures that one set of rules applies to all pension plans. See Anderson, 24 F.3d at 891; Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987).

In Anderson, 24 F.3d at 891, the plaintiff alleged that the provider of a health maintenance organization violated state statutory and common laws of fraud and deceptive practices by failing to provide complete information about its benefits plan. The court of Appeals for the Seventh Circuit

held that ERISA preempted these state law claims, because the claims centered around the information given to employees about the benefits provided by an employer's plan. Similarly, the court held that a state common law fraud claim clearly would be preempted by ERISA. See Andersen, 99 F.3d at 856. The court stated that a claim alleging that a plan description is "false and misleading" is properly brought under § 502 of ERISA; 29 U.S.C. § 1132, for a breach of the plan administrator's duty to describe the plan benefits sufficiently. Id.

Plaintiffs assert that the situation is governed by Smith v. Texas Children's Hospital, 84 F.3d 152, 155 (5th Cir. 1996), in which the court held that a claim for "fraudulent inducement" was not preempted by ERISA when the facts were that the plaintiff had quit her job and relinquished her accrued benefits in reliance upon the hospital's misrepresentations that she would enjoy the same benefits in her new job. Even if Smith had precedential value in this circuit, it is factually distinguishable from this case. Smith was suing for benefits already accrued at her former job at the time of her resignation. By contrast, plaintiffs are suing for benefits that had not yet accrued at Trane at the time plaintiffs transferred to defendant ALTEC. They are not seeking to recover the benefits already accrued and vested at the time of their resignations; this amount will be paid to them in their Trane pensions. Rather, plaintiffs are seeking to recover the amount that they would have accrued in their Trane pensions after the time of their transfer to defendant ALTEC had they remained employed by Trane. Moreover, in the Smith case, plaintiff Smith had not been informed that she no longer enjoyed the same benefits as with her former employer; in fact, she was given oral and written assurances to the contrary. See id. at 153. In this

case, plaintiffs were given documents that described how their pensions would be calculated.

Plaintiffs' claims of fraudulent representation, breach of contract, intentional misrepresentation, negligent misrepresentation and strict responsibility misrepresentation each relate to and are connected with plaintiffs' pension plans and fall squarely within ERISA's preemption clause. Therefore, these claims must be dismissed.

B. ERISA Statute of Limitations

Section 413(a) of ERISA, 29 U.S.C. § 1113(a), allows claims of ERISA fiduciary duty violations to be brought only within the earlier of: 1) six years after the last action which constitutes the breach; or 2) three years after the plaintiff had actual or constructive knowledge of the breach. If the defendant attempts to conceal the fact of the breach, the statute of limitations is six years. 29 U.S.C. § 1113(a); see also Radiology Center, S.C. v. Stifel, Nicolaus & Co., 919 F.2d 1216, 1220 (7th Cir. 1990).

Although plaintiffs contend that they did not have actual knowledge of the breach until approximately 1994, the undisputed facts establish that the last actions constituting the breach occurred in 1985 and 1986, when representatives of defendant ALTEC told certain plaintiffs that they would "not lose anything" from their Trane benefits upon transferring their employment to defendant ALTEC. The statute is clear that suit must be commenced by the earlier of six years after the breach or three years after actual or constructive knowledge of the breach. Taking the earlier date, a timely action for breach of fiduciary duty would have to have been commenced in 1992, six years after 1986, the

date of the last action constituting the alleged breach.

Plaintiffs try to demonstrate that the last actions constituting the ERISA violations took place in 1995 by citing Varity Corp. v. Howe, 516 U.S. 489 (1996). Although Varity addresses whether an employer's misrepresentations about the future of its employees' pension plans constitute a breach of fiduciary duty, the case does not provide a basis for finding that plaintiffs' claims are timely. The undisputed facts establish that the alleged misrepresentations all occurred during 1985 and 1986. Plaintiff Spangler's 1995 letter from the union representative cannot be considered an additional breach of defendants' fiduciary duties. The letter neither contained any misrepresentations regarding the calculation of plaintiffs' pensions nor was sent on defendants' behalf.

In the alternative, plaintiffs contend that their claim is timely because defendants engaged in fraudulent concealment, which extends the statute of limitations to six years after discovery of the breach. 29 U.S.C. § 1113(a). To prove that fraudulent concealment occurred, plaintiffs must demonstrate that defendants took active steps to hide the fact of the breach. See Radiology Center, 919 F.2d at 1220. Plaintiffs have failed to show that defendants attempted to hide the terms of its benefits package. In fact, some plaintiffs concede that they received certain documents explaining the benefits package from the defendants. Although some of the plaintiffs may not have understood the terms of their pension plans, defendants' failure to ensure that all employees fully understood their benefits does not constitute fraudulent concealment for the purpose of the ERISA limitations period.

C. Estoppel and Denial of Benefits Claims

Section 502 of ERISA allows a participant or beneficiary of a benefits plan to assert a cause of action to recover benefits due under the terms of the written plan. See 29 U.S.C. § 1113(a)(1)(B). Employers may be estopped from denying such benefits. See Schmidt v. Sheet Metal Workers' Nat'l Pension Fund, 128 F.3d 541, 546 (7th Cir. 1997) (citing Black v. TIC Inv. Corp., 900 F.2d 112, 116 (7th Cir. 1990)). However, employers cannot be estopped from denying benefits due under oral modifications to the written benefits plan. See id.; Plumb v. Fluid Pump Service, Inc., 124 F.3d 849, 856 (7th Cir. 1997). When "the written terms of an ERISA plan do not entitle the claimant to the coverage sought, benefits will not be forthcoming on the basis of oral representations to the contrary." Plumb, 124 F.3d at 856 (citations omitted).

In Schmidt, 128 F.3d at 546, the Seventh Circuit refused to "apply estoppel principles to give effect to oral representations that contradict written Plan terms." The plaintiff's father wanted to change the beneficiary of his pension death benefit so that the plaintiff would be the new beneficiary. After speaking to a benefits analyst, the plaintiff's father filled out the incorrect form for changing beneficiaries. Because oral representations made by the benefits analyst regarding which form was required to switch beneficiaries clearly conflicted with the written plan instructions, the court denied the plaintiff's estoppel claim for his father's pension death benefit. See id.

Similarly, plaintiffs' claims for loss of pension benefits depend solely on oral representations that plaintiffs would "not lose anything" from their Trane benefits. This

oral representation clearly contradicts the written terms of their pension plans. Therefore, defendants are entitled to summary judgment on plaintiffs' claims for estoppel and denial of benefits.

D. Vacation Pay Claims

Claims for vacation pay are not governed by ERISA. See 29 C.F.R. § 2510.3-1(b)(3)(i). Vacation pay claims are governed by Wisconsin's statute of limitations for contract claims. See Green v. Granville Lumber & Fuel Co., 60 Wis. 2d 584, 589, 211 N.W.2d 467, 470 (1973). Claims for breach of contract must be commenced within six years after the cause of action accrues. See Wis. Stat. § 893.43. The cause of action accrues at the moment the contract is breached. See CLL Associates Limited Partnership v. Arrowhead Pacific Corporation, 174 Wis. 2d 604, 607, 497 N.W.2d 115, 116 (1993).

Both parties misinterpret when the applicable statute of limitations begins to run. The six-year limitations period starts when the contract is breached, not when the plaintiffs become aware of the breach. See id. Therefore, the statute of limitations begins running when the vacation benefits are denied. Contracts requiring continuous performance, such as a contract to provide annual vacation benefits, may be breached by a series of partial breaches or by one total, complete breach. See Segall v. Hurwitz, 114 Wis. 2d 471, 491, 339 N.W.2d 333, 343 (Ct.App. 1983) (citations omitted). Accordingly, a series of breaches could have occurred annually, when each plaintiff failed to receive his vacation benefits, or a total breach could have occurred in 1986, when documents were distributed outlining the benefits package. Because both sides failed to address this

issue, summary judgment cannot be granted to defendants.

It is not clear, however, whether plaintiffs can pursue these claims relating to vacation pay. If the claims arise under state law, this court would have no independent jurisdiction over them in the absence of a showing of diversity between plaintiffs and defendants and an amount in controversy in excess of $75,000. 28 U.S.C. § 1332. Although federal courts have jurisdiction to entertain state law claims when they are supplementary to federal law claims and are so related to those claims as to form part of the same course or controversy, see 28 U.S.C. § 1367, the general rule is that courts are to decline to exercise supplementary jurisdiction over such claims when the federal claims to which they are supplementary are dismissed before trial. Van Harken v. City of Chicago, 103 F.3d 1346, 1354 (7th Cir. 1997).

If plaintiffs intend to pursue their vacation pay claims in this court, they should so advise the court and opposing counsel no later than April 24, 1998, and should set forth in writing the reasons for their belief that the claims arise under federal law or, alternatively if they cannot show the claims to be federal in nature, their reasons for believing that the court should not relinquish jurisdiction over the claims.

ORDER

IT IS ORDERED that defendants' motion for partial summary judgment is GRANTED with respect to plaintiffs' claims of fraudulent representation, breach of contract, intentional, negligent and strict responsibility misrepresentations, breach of ERISA fiduciary duty, estoppel and denial of benefits; defendants' motion is DENIED with

respect to plaintiffs' vacation pay claims.

FURTHER, IT IS ORDERED that plaintiffs have until April 24, 1998, in which to advise the court and defendants' counsel whether their vacation pay claims arise under federal law or, if not, why the court should not relinquish jurisdiction over the claims. Defendants may have until May 8, 1998, in which to respond.

Entered this 13th day of April, 1998.

BY THE COURT:

BARBARA B. CRABB
District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

JAMES SPANGLER, DONALD MELCHER, WAYNE J. BIELEFELDT, DALE CHRISTIANSON, ROBERT CLARK, HAROLD DANIELSON, DENNIS A. GERKE, DAVID GOODE, KEITH HUBER, WILLIAM HUTSCHENREUTER, RAY JANISCH, OSWALD A. KLOMSTEN, JERRY MUNYON, EMIL D. POTARACKE, RODERICK SAND, GORDON STENSLIEN, STANLEY STUGEN, and ROBERT TAYLOR,

Plaintiffs,

v.

ALTEC INTERNATIONAL LIMITED PARTNERSHIP, a domestic limited partnership, CHART INDUSTRIES, INC., a Delaware Corporation, and ALTEC INTERNATIONAL LIMITED PARTNERSHIP PENSION PLAN AND TRUST FOR HOURLY EMPLOYEES,

Defendants.

OPINION AND ORDER

97-C-338-C

In an opinion and order entered April 13, 1998, I granted defendants' motion for partial summary judgment with respect to all of plaintiffs' federal law claims and directed the parties to advise the court whether it should relinquish jurisdiction of plaintiffs' state law claims. Defendants argue in favor of relinquishing jurisdiction over the remaining claims. In support of retaining jurisdiction, plaintiffs observe that this case has been proceeding in federal court for about a year and that eighteen plaintiffs and two defense witnesses have been deposed. Further, plaintiffs' counsel avers that at least 40 sets of written discovery have been answered and that should this case return to Circuit Court for La Crosse County there is slim chance of obtaining a trial date within the next year and half because of the backlog of cases in that system. Aff. of Timothy Jacobson (Dkt. #67) at ¶¶ 2 and 4. Despite these concerns, I conclude that retention of jurisdiction over plaintiffs' state law claims is inadvisable.

Pursuant to 28 U.S.C. § 1367(c)(3), a district court "may decline to exercise supplemental jurisdiction over" state law claims when it "has dismissed all claims over which it has original jurisdiction." The court should be guided by considerations of "judicial economy, convenience, fairness and comity . . . ." Wright v. Associated Ins. Companies, Inc., 29 F.3d 1244, 1251 (7th Cir. 1994). When all federal claims are dismissed before trial, the general rule is that jurisdiction should be relinquished. Id. However, in "unusual cases," the balance of applicable considerations may weigh in favor of retaining jurisdiction. Id. In Timm v. Mead Corp., 32 F.3d 273, 277 (7th Cir. 1994), the Court of Appeals for the Seventh Circuit discussed one such unusual case, stating:

> Here, by the time the [age discrimination] claim was dismissed, the state law claims were ripe for decision, the applicable state law was straightforward, the litigation was well over a year old, and discovery, which had been at times contentious, was completed. The district court reasonably concluded that there was no need to delay the resolution of this matter (and add to the burdens of the Illinois court system) by having the parties litigate the unspectacular state law issues anew in state court.

Over Timm's objection, the court of appeals found that the district court did not abuse its discretion by proceeding to dismiss his state law claims on their merits after granting summary judgment in favor of the defendant on the federal claims. Id. at 276-277. Retaining jurisdiction is less advisable when the remaining state law claims have not been briefed and argued by the parties; often, this is an indication that there has been little investment of federal judicial resources. See id. at 277 n.2 ("dismissal at pleading stage usually counsels in favor relinquishing jurisdiction"); Wright, 29 F.3d at 1251.

Plaintiffs maintain that this case is analogous to Timm but they overlook a critical distinction. Although the district court retained jurisdiction over Timm's state law claims, doing so served state *and* federal judicial economy because it enabled the district court to dispose of *all* claims in the same motion. Cf. Wright, 29 F.3d at 1251 ("Here there is no suggestion that the district court reached Wright's state-law claims to conserve judicial resources"). There is a reason why district courts are directed to consider the extent to which they have invested judicial resources in a particular case; the objective is to avoid situations in which "sending

the case to another court will cause a substantial duplication of effort." Id. This principle overlaps with the related notion that "judicial economy, convenience, fairness and comity may point to federal retention . . . when it is absolutely clear how the pendent claims can be decided." Id. Relinquishing jurisdiction in this case would not implicate either of these concerns. In the April opinion and order, I did not reach the merits of plaintiffs' state law claims or have any occasion to determine how these claims should be decided. Consequently, there is little for a state court to duplicate and I have no basis for determining the relative complexity or importance of the issues implicated by the state claims. Finally, as observed by defendants, all of the discovery generated in this case may be used in the state court proceedings.

Admittedly, convenience and fairness may weigh on plaintiffs' side given that they have pursued this action for the past year and are within a month of the scheduled trial date. However, these interests are insufficient to overcome the policy considerations militating in favor of restricting the federal courts' exercise of jurisdiction over state law claims.

ORDER

IT IS ORDERED that plaintiffs' state law claims are dismissed without prejudice pursuant to 28 U.S.C. § 1367(c)(3).

Entered this 11th day of May, 1998.

BY THE COURT:

BARBARA B. CRABB
District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

JAMES SPANGLER, DONALD MELCHER, WAYNE J. BIELEFELDT, DALE CHRISTIANSON, ROBERT CLARK, HAROLD DANIELSON, DENNIS A. GERKE, DAVID GOODE, KEITH HUBER, WILLIAM HUTSCHENREUTER, RAY JANISCH, OSWALD A. KLOMSTEN, JERRY MUNYON, EMIL D. POTARACKE, RODERICK SAND, GORDON STENSLIEN, STANLEY STUGEN, and ROBERT TAYLOR,

Plaintiffs,

v.

ALTEC INTERNATIONAL LIMITED PARTNERSHIP, a domestic limited partnership, CHART INDUSTRIES, INC., a Delaware Corporation, and ALTEC INTERNATIONAL LIMITED PARTNERSHIP PENSION PLAN AND TRUST FOR HOURLY EMPLOYEES,

Defendants.

JUDGMENT IN A CIVIL CASE

Case No. 97-C-338-C

This action came for consideration before the court with U.S. DISTRICT JUDGE BARBARA B. CRABB presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that defendants' motion for partial summary judgment is GRANTED with respect to plaintiffs' claims of fraudulent representation, breach of contract, intentional, negligent and strict responsibility misrepresentation, breach of ERISA fiduciary duty, estoppel and denial of benefits. IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs' state law claims are dismissed without prejudice and this case is CLOSED.

Joseph W. Skupniewitz, Clerk of Court May 12, 1998

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JAMES SPANGLER, DONALD MELCHER,
WAYNE J. BIELEFELDT, ET AL.,

Plaintiffs-Appellants,

v. Appeal No. 98-2437

ALTEC INTERNATIONAL LIMITED
PARTNERSHIP, CHART INDUSTRIES,
INC. and ALTEC INTERNATIONAL
LIMITED PARTNERSHIP PENSION PLAN
AND TRUST FOR HOURLY EMPLOYEES,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin
Case No. 97 C 0338 C
The Honorable Barbara B. Crabb, Presiding

BRIEF OF THE PLAINTIFFS-APPELLANTS

(Tables omitted)

STATEMENT OF JURISDICTION

The jurisdiction of the district court case is based upon 28 U.S.C. sec. 1331 *et seq.*, in that the action is based upon claims for breach of fiduciary duty under ERISA sec. 502(a)(3), to declare and enforce rights under certain employee benefit plans pursuant to ERISA sec. 502(a)(1)(B) ERISA federal common law for estoppel. As to the claims for misrepresentation and breach of contract under state law, jurisdiction was also based on pendant jurisdiction pursuant to 28 U.S.C. sec. 1367.

The jurisdiction of the court of appeals is based upon 28 U.S.C. Sec.1291. The judgement appealed from is final and was entered on May 12, 1998. The filing date of the notice of appeal is June 8, 1998.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district err in its finding that the statute of limitations set forth in Section 413(a) of ERISA, 29 U.S.C. §1113 (1)(A), which allows claims of ERISA fiduciary duty violations to be brought within the earlier of six years after the last action which constituted a part of the breach or violation or three years after the plaintiff had actual knowledge of the breach, had run prior to the commencement of this action?

STATEMENT OF THE CASE

1. Course of Proceedings.

This action was commenced in the United States District Court for the Western District of Wisconsin on May 13, 1997 with claims for breach of fiduciary duty under ERISA §502(a)(3), to declare and enforce rights under certain employee benefit plans pursuant to ERISA §502(a)(1)(B), ERISA federal common law for estoppel, and alternative claims for fraudulent representations under Wis. Stat. §100.18, and breach of contract under state law.

On February 12, 1998, defendants moved for partial summary judgement requesting the dismissal of all claims except those for vacation benefits. After submission of briefs, affidavits and other supporting documents by both sides, the district court granted defendants motion on April 13, 1998 dismissing plaintiffs' federal claims. The district court did so on the basis that the statute of limitations had run before the commencement of this action.

On May 11, 1998, the district court rendered its opinion and order that the district would relinquish its jurisdiction of plaintiffs' remaining state law claims and dismissed the claims without prejudice. On May 12, 1998, Judgement of dismissal was entered.

The plaintiffs filed their notice of appeal on June 8, 1998.

2. Statement of Facts.

The Plaintiffs are a mix of eighteen past and present employees of Altec International Limited Partnership, f/k/a Albraze, which is owned or controlled by Chart Industries, Inc., and Arthur Holmes (hereinafter collectively referred to as "Altec"). Plaintiffs brought this action alleging violations

of Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 832, as amended, 29 U.S.C. §1001 *et seq.*, federal common law arising thereunder, and certain state laws. Prior to Altec, Plaintiffs were employed by Trane Company (hereinafter "Trane") as factory workers in its brazed aluminum manufacturing plant known as plant three. (Complaint, ¶1.)

In or about late 1985 and early 1986 Trane desired to sell its brazed aluminum operations. During this time, various meetings were held with Trane employees, including the plaintiffs, regarding Altec's purchase of Trane's brazed aluminum operations and the resulting effect on the existing employees, including the plaintiffs. (hereinafter the "Meetings") (Affidavit of James Spangler, at ¶4.)

Altec needed skilled welders such as Spangler and certain other plaintiffs in order to continue the plant three operations and to train a new generation of welders. Altec was unable to recruit highly skilled welders such as the Plaintiffs elsewhere. (*Id.*, at ¶5.)

The work of several of the plaintiffs as welders involved highly specialized training and skills for performing internal repair of brazed aluminum heat exchangers. Very few companies in the world manufacture such units and said plaintiffs would be sent around the globe to make on-site repairs. (Affidavit of James Spangler, par. 3.)

Plaintiffs were concerned about transferring to Altec. Plaintiffs had many years of service and seniority at Trane and did not want to lose the benefits that went with the many years of continuous service. One or more employees at the Meetings raised the concern whether, upon retirement,

employees would be worse off or lose anything in comparison to remaining with Trane. (*Id.*, at ¶6.)

At the Meetings, George Snapp, Jr., employed in management at plant three and to continue in such capacity for Altec, said that the goal was to see most all of the plant three employees transfer to Altec. Snapp explained that said employees, including the plaintiffs, were critical to the success of Altec. Snapp promised that if the plaintiffs transferred to Altec, the transfer would not take anything away from the plaintiffs; specifically that they would not lose any benefits they would have had if they remained with Trane. (*Id.*, at ¶7.)

Also at the Meetings, Arthur Holmes told the plaintiffs, among other employees, that he would be unable to buy Trane's brazed aluminum operation unless the employees transferred to Altec. Holmes further assured the plaintiffs that should they transfer to Altec, they would have nothing to fear because they would not lose any benefits, and it was going to be just like continuing to work for Trane. (*Id.*, at ¶8.)

At one of the Meetings, the employees present at the meeting were shown by Altec a comparison of benefits between those at Trane and those they would receive if they transferred employment to Altec. (*Id.*, at ¶9.)

On a number of occasions, Holmes walked around the plant three floor encouraging employees, including the plaintiffs, to transfer their employment to Altec. Snapp also walked around the plant floor on numerous occasions telling said employees that they had nothing to worry about by transferring to Altec because they would not lose any of the

benefit of their years working for Trane. (*Id.*, at ¶11.)

Based on the above promises of Altec and the comparison of benefits between Trane and Altec, the employees decided to transfer to Altec. (*Id.*, at ¶13.)

In October of 1994, plaintiff James Spangler (hereinafter "Spangler") spoke to fellow employee and plaintiff Oswald Klomsten (hereinafter "Klomsten") regarding Klomsten's intent to retire. Klomsten requested that Altec calculate his anticipated pension benefits. Klomsten was concerned that the benefits were less than promised by Altec. (*Id.*, at ¶14.)

Based on conversations with Klomsten, Spangler concluded Altec was calculating Klomsten's pension benefits wrong in that his combined Trane and Altec pensions totaled an amount less than had he worked continuously at Trane over the same number of combined years. (*Id.*, at ¶15.)

Spangler contacted union steward Dan Mihalovic regarding Altec's failure to pay benefits as promised. Mihalovic responded by letter of January 13, 1995 (Defendants' Dep. Ex. 4), which referenced a copy of what purported to be the second page of a one page memorandum from Arthur S. Holmes, dated April 15, 1986. (Defendants' Dep. Ex. 5.) The memorandum was provided to Spangler as an explanation as to why the employees who transferred from Trane would lose pension benefits in comparison to Trane employees who did not transfer. Spangler had never seen the alleged "second memo page" before. (*Id.*, at ¶17.)

On March 17, 1995, Spangler met with Arthur Holmes regarding Altec's refusal to pay the benefits Altec

promised. Holmes refused to take any action to rectify the situation. (*Id.*, at ¶18.)

Spangler subsequently discussed his concerns with several fellow Altec employees and was informed by each of them that they too were told that transferring their employment from Trane to Altec would not result in the loss of any benefits, including pension benefits, in comparison to the benefits they would receive had they worked for Trane continuously for the same number of years as their combined Trane and Altec service. Spangler also discussed the alleged "second memo page" with them, and all agreed they had never seen it before. (*Id.*, at ¶19.)

As a result of Altec's failure to pay as promised, the Plaintiffs have suffered a loss of pension, health care, and vacation benefits. (*Id.*, at ¶20.)

Two years and seven months after Altec's failure to pay as promised Plaintiffs commenced this action on May 13, 1997. The plaintiffs filed their complaint with claims for breach of fiduciary duty under ERISA §502(a)(3), to declare and enforce rights under certain employee benefit plans pursuant to ERISA §502(a)(1)(B), ERISA federal common law for estoppel, and alternative claims for fraudulent representations under Wis. Stat. §100.18, and breach of a contract under state law.

SUMMARY OF ARGUMENT

The ERISA statute of limitations requires that plaintiffs commence an action within the earlier of six years after the last action which constituted a part of the breach or violation or three years after the plaintiffs had actual

knowledge of the breach.

The last action which constituted a part of the breach was Altec's failure to perform on their promises to pay benefits as aforementioned. This failure to perform occurred at the time of plaintiff Klomsten's retirement in October 1994. It was at the same time, October 1994, when the first plaintiffs, Spangler and Klomsten, had actual knowledge of the breach. The other plaintiffs did not learn of the breach until later meetings among the plaintiffs.

Plaintiffs commenced this action in May 1997, two years and seven months, after Altec's failure to pay as promised. Correctly applying the earlier "three year" statute as opposed to the "six year" statute the plaintiffs commenced this action prior to the expiration of the statute of limitations.

The district court's decision that the statute of limitations had run was premised on its finding that "the undisputed facts establish that the last actions constituting the breach occurred in 1985 and 1986, when representatives of defendant Altec told certain plaintiffs that they would not 'lose anything' from their Trane benefits upon transferring. . . ." and that the "alleged misrepresentations all occurred during 1985 and 1986." The district court thus ruled that the six-year statute had run no later than 1992.

The court's application of the period of limitation for filing suit is incorrect. Assuming the 1986 promises were misrepresentations, those promises were not the "last action" constituting part of the breach. The "last action" would have been the payment of the reduced retirement benefit, which would not have occurred until after the employees in

question retired. The payment of the reduced amount occurred less than six years prior to commencement of suit.

The claims under ERISA § 502(a)(1)(B) are even more clearly within the statute of limitations. Recent Seventh Circuit decisions indicate that claims for violation of that section do not even accrue until "benefits were denied." It was only after the employees' retirement occurred that their benefits were actually denied.

Finally, a holding that allows this case to proceed to trial will afford an opportunity for the injustice endured by Plaintiffs to be reversed.

ARGUMENT

I. The ERISA statute of limitations required that plaintiffs commence this action within the earlier of six years after the last action which constituted a part of the breach or violation or three years after the plaintiff had actual knowledge of the breach.

Section 413(a) of ERISA, 29 U.S.C. §1113 (1)(A) allows claims of ERISA fiduciary duty violations to be brought within the earlier of: 1) six years after the last action which constituted a part of the breach or violation; or 2) three years after the plaintiff had actual knowledge of the breach.

Specifically the statute provides:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under

> this part, or with respect to a violation of this part, after the earlier of - (1) six years after (A) the date of the last action which constituted a part of the breach or violation, (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

For purposes of this appeal fraud or concealment is not an issue.

Case law has interpreted this statute exactly as it reads. "The plaintiff in a suit under ERISA against a fiduciary has six years after the 'breach or violation' in which to sue, or three years after the plaintiff 'had actual knowledge of the breach or violation,' whichever comes first..." *Wolin v. Smith Barney Inc.*, 83 F.3d 847, 850 (7th Cir. 1996), *quoting*, 29 U.S.C. §1113.

Thus the plaintiffs were required to commence this action within six years of the last action constituting Altec's breach of its promise to pay the agreed benefits or within three years of when plaintiffs had actual knowledge of said breach.

II. The 'last action constituting the breach' occurred when Altec denied pension benefits by issuing benefit checks of less than the amount promised in October 1994

The limitation period under the "six year" provision does not begin to run until the 'last action which constituted a part of the breach is complete.

A breach by its very definition requires a failure to perform. The Restatement of Contracts defines a breach as "nonperformance of any contractual duty of immediate performance". Restatement, 1 Contracts, p. 462, ch. 11, sec. 312. Black's defines a breach as failure, without legal excuse, to perform any promise which forms the whole or part of a contract. Blacks Law Dictionary p.188 (6th ed. 1990).

The Seventh Circuit has held that claims for recovery of benefits under §502(a)(1)(B) of ERISA accrue when benefits are denied. *See Tolle v. Caroll Touch, Inc.*, 977 F.2d 1129, 1139 (7th Cir. 1992), (citing *Jenkins v. Local 705 Int'l Bhd of Teamsters Pension Plan*, 713 F.2d 247, 254 (7th Cir. 1983); see also *Benjamin v. Marshall P. Morris, Ltd.*, 1998 WL 299434 *2 (N.D. Ill).

In fact a separate cause of action may arise for each occasion there is a failure to pay. In a case before the Ninth Circuit, plaintiff sued for breach of fiduciary duty when the company she worked for charged employees the same rate for life insurance after the company switched insurance carriers and the cost of the insurance was reduced. The court held that each time the company issued a check of a reduced amount, there was a breach of fiduciary duty, and thus the plaintiff was within the applicable statute of limitations. See *Korchek v. Nichols-Homeshield*, 1997 WL 619869, *3 (N.D.Ill.) See *Meagher v. International Assn. of Machinists and Aerospace Workers Pension Plan*, 856 F.2d 1418, 1423 (9th Cir.1988), cert. denied, 490 U.S. 1039, 109 S.Ct. 1943,

104 L.Ed.2d 414 (1989).

Altec's last action constituting part of the breach of fiduciary duty occurred at the time Altec issued a pension check to Plaintiff Klomsten in an amount less than the promised pension benefit. Therefore, the 'last action which constituted part of the breach' occurred on the date the check was issued in October 1994.

It was not Altec's promises in 1985 and 1986 which were the 'last action[s] which constituted a part of the breach.' The court's application of the period of limitation for filing suit based on the promises in 1985 and 1986 is incorrect.

Assuming the 1985 and 1986 promises were misrepresentations, those promises were not the "last action" constituting part of the breach. Altec's denial of benefits must be regarded as an "action which constituted a part of the breach or violation." The "last action" would have been the payment of the reduced retirement benefit, which would not have occurred until after the employees in question retired. While the 1985 and 1986 promises might have been false or careless, those promises were only part of, but not the "last action" constituting the breach.

It was only after the employees' retirement occurred that their benefits were actually denied. Even the written explanation of benefits Altec relies on would be only a part of the breach, not the last act.

The payment of the reduced amount occurred less than six years prior to commencement of suit. Thus, this action was commenced within six years of the actual denial

of the benefit promised.

III. Plaintiffs' claims are not barred by the statute of limitations, because they commenced this action within the shortest possible limitation period.

As previously noted, the ERISA statute of limitations specifies that the earlier of the six-year or three-year period of limitation applies.

The Seventh Circuit has held that under ERISA, the "statute of limitations for suits against fiduciaries does not begin to run at the time of injury, but instead at the time the prospective plaintiff acquires actual knowledge of the breach of fiduciary obligation." *Wolin*, 83 F.3d at 853.

Further, the Ninth Circuit has interpreted 29 U.S.C. §1113 to mean that the "limitations period in an ERISA action begins to run on the date that the person bringing the suit learns of the breach or violation." *Landwehr v. Dupree*, 72 F.3d 726 (9th Cir. 1995).

29 U.S.C. §1113(2) requires "actual knowledge of the breach or violation." Constructive knowledge or suspicion is an insufficient basis for invoking 29 U.S.C. §1113(2). *See Rush v. Martin Petersen Co.*, 83 F.3d 894, 896 (7th Cir.1996); *Radiology Center, S.C. v. Stifel, Nicolaus & Co.*, 919 F.2d 1216, 1222 (7th Cir.1990).

> "[Actual knowledge] requires a showing that plaintiffs actually knew not only of the events that occurred which constitute the breach or violation but also that those events supported a claim for breach of fiduciary duty or violation under ERISA. Based on

> this test, the Third Circuit held that the defendant fiduciary failed to make the showing of actual knowledge necessary to meet the "stringent requirement" imposed by ERISA §413(2), 29 U.S.C. §1113(2)." *Maher v. Strachan Shipping Co.*, 68 F.3d 951, 954-55 (5th Cir. 1995) (citing *Int. Union v. Murata Erie North America*, 980 F.2d 889, 900-01 (3d Cir.1992)).

In the present case, both injury and 'actual knowledge' occurred simultaneously when Altec denied full benefits to their employees in October 1994. According to the ERISA statute of limitations, the three-year period would run from 1994, and would be earlier than the six-year period. The "three year" statute would thus control.

Plaintiff Klomsten retired in October 1994 and began receiving reduced benefit checks shortly thereafter. The statute of limitations began to run at that time. Suit was filed on May 13, 1997, well before the three-year periods of limitation imposed by the statute.

Defendants contend that even without any knowledge of the fiduciary breach by the Plaintiffs, a six-year statute of limitations would have started to run when the misrepresentations were made. However, these "misrepresentations" were promises when they were first made, and only became misrepresentations when Altec denied full benefits by issuing pension checks for less than the amount promised. In short, a promise, once made, cannot become a misrepresentation until a breach occurs. Therefore, the six-year statute of limitations would run from the time that the promise, through breach, becomes a misrepresentation. As stated above, this did not occur until

October 1994.

Even if the Defendant's notion is assumed, Plaintiffs did not acquire "actual knowledge" until October of 1994. In an appeal from a case filed in 1992 in the Eastern District of Wisconsin in which plaintiff's sole claim was for breach of fiduciary duty based on an oral promise made in 1966, the Seventh Circuit held that ERISA's three-year statute of limitations began to run in 1987 because that was when the plaintiff acquired "actual knowledge" of the breach. See *Rush*, 83 F.3d at 896. The Court of Appeals makes no mention of the fact that more than six years had passed since the 1966 oral promise. *See Id.*

This leads to the obvious inference that it is the "actual knowledge" portion of the ERISA statute of limitations that is more meaningful in evaluating breach of fiduciary duties under ERISA. In *Landwehr*, a claim for misuse of pension funds, the court states that to allow the limitations period to run from the date of breach would be "unfair" and is counter to a "primary purpose of ERISA" in protecting pension funds from unscrupulous persons. *See Landwehr*, 72 F.3d at 733.

The Defendants contend that the Plaintiffs *should* have known, at the time of transferring their employment to Altec, that in the future when the Plaintiffs would eventually retire, their combined Altec and Trane pension benefits would be less than had they worked continuously at Trane over the same time period. For example, Defendants' contention would mean that these blue collar workers should have known that a pension for 30 years of Trane service plus a pension for 10 years of Altec service does not equal 40 years of continuous Trane service. This is not a self-evident

proposition.

IV. Holding that the statute of limitations has run would undermine ERISA and encourage the unscrupulous employer to renege on promises made to employees.

Courts have recognized that the rather extended general limitation period of ERISA was intended to impress upon fiduciaries the importance of the trust they hold. *See Brock v. Nellis*, 809 F.2d 753, 754 (11th Cir.1987). "Congress evidently did not desire that those who violate that trust could easily find refuge in a time bar." *Id.*

A holding that the statute of limitations has run in this case would give employers free reign to lie to employees in order to entice them to work for them. Altec knew it had promised the Plaintiffs that their total pension in the future would keep pace with what they would have had at Trane. Their handwritten notes confirm that.

Conveniently, Altec now seeks to reinterpret their communications by suggesting that all they really meant was that Plaintiffs would not lose their vested benefits at Trane, of which there was never a fear of losing. Rather, Plaintiffs were concerned about continuous employment benefits. Plaintiffs sought, and were given, assurances that their concerns were unfounded, and that they would retire as comfortably and securely as Altec employees as if they were Trane employees. They should not be punished for the unscrupulous behavior of their employer.

In addition, allowing ghastly behavior, like that of Altec places an undue burden upon all employees. The party

with the most immediate control and influence over a pension plan is the employer. The employer ought to have the burden of clearly communicating ongoing developments with the pension plan – not the employee. Supplying convoluted documents (which Plaintiffs deny receiving) to blue-collar workers does not take the fiduciary duty seriously.

It is common sense that the employees would not have transferred had they knew they would receive less retirement income than had they remained with Trane. Altec took great measures to convince Plaintiffs that they would "lose nothing" if they transferred their employment – including attending Union meetings and visiting the plant floor to assure their workers they had nothing to worry about. It would be prudent to expect the same diligence from Altec in expressing their method of calculating benefits. A simple memo does not suffice.

Finally, reversing the decision of the trial court and allowing this claim to proceed to trial will send a clear message to employers that they are to treat their fiduciary duty with utmost respect. It will instill confidence among employees that their employers are accountable for the oral promises they make and, ultimately, will produce better relations between management and workers.

CONCLUSION

The ERISA statute of limitations required that plaintiffs commence an action within the earlier of six years after the last action which constituted a part of the breach or violation or three years after the plaintiffs had actual knowledge of the breach. Altec's failure to pay the benefits

it promised to the plaintiffs was the last action constituting a part of the breach as well as the time when plaintiffs gained actual knowledge of the breach. Plaintiffs commenced this action within three years of Altec's failure to pay. The district court erred in finding the statute of limitations had run prior to suit being filed.

Accordingly, the judgement of the district of court should be vacated and the case remanded for a trial on all claims.

Respectfully submitted,

Kevin C. O'Keefe
Attorney for the Plaintiffs-Appellants

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JAMES SPANGLER
3354 East Avenue South
La Crosse, WI 54601,

DONALD MELCHER
2505 Hoeschler Drive
La Crosse, WI 54601,

WAYNE J. BIELEFELDT
W5410 CTH B
La Crosse, WI 54601,

DALE CHRISTIANSON
N5549 Hole Road
West Salem, WI 54669,

ROBERT CLARK
RR. 3, W5585 #9
La Crosse, WI 54601,

HAROLD DANIELSON
W1526 County Road T
Mindoro, WI 54644,

DENNIS A. GERKE
W4185 Hwy. 33
La Crosse, WI 54601,

AMENDED
COMPLAINT

Civil Action, File No.
97-C-0338-C

DAVID GOODE
608 South 8th
La Crosse, WI 54601,

KEITH HUBER
1507 Viking Avenue
Holmen, WI 54636,

WILLIAM HUTSCHENREUTER
912 South 16th Street
La Crosse, WI 54601,

RAY JANISCH
W5820 Janisch Road
Stoddard, WI 54658,

OSWALD A. KLOMSTEN
825 East 2nd
Trempealeau, WI 54661,

JERRY MUNYON
R #2
Genoa, WI 54632,

EMIL D. POTARACKE
1927 South 21st Terrace
La Crosse, WI 54601,

RODERICK SAND
3027 Scarlett Drive
La Crosse, WI 54601,

GORDON STENSLIEN
903 Birch
Stoddard, WI 54658,

STANLEY STUGEN
428 West Franklin
West Salem, WI 54669,

ROBERT TAYLOR
2513 2nd Avenue East
La Crosse, WI 54601,

Plaintiffs,

vs.

ALTEC INTERNATIONAL LIMITED
PARTNERSHIP, a domestic limited partnership,
2191 Ward Avenue
La Crosse, WI 54601,

CHART INDUSTRIES, INC.,
a Delaware corporation,
35555 Curtis Blvd.
Eastlake, Ohio 44095,

and

ALTEC INTERNATIONAL LIMITED
PARTNERSHIP PENSION PLAN AND
TRUST FOR HOURLY EMPLOYEES,
2191 Ward Avenue
La Crosse, WI 54601,

Defendants.

NATURE OF THE CASE

1. Plaintiffs bring this action alleging violations of Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 832, as amended, 29 U.S.C. §1001 *et seq.*, federal common law arising thereunder, and certain state laws. Plaintiffs allege that they were employees of Trane Company prior to 1986, and were induced to accept employment with a spin-off company, ALBRAZE International, Inc., n/k/a ALTEC International Limited Partnership, between 1986 and 1988 inclusive, with the promise that they would continue to receive the same level of benefits as if they had never left employment with Trane Company. As a result of the acts and omissions of the Defendants herein, the Plaintiffs have suffered the loss of pension benefits and health care benefits in violation of ERISA.

JURISDICTION AND VENUE

2. This action is brought pursuant to federal statutes, giving this court jurisdiction over this matter under 29 U.S.C. §1132(f) and 28 U.S.C. §1331. The Court has pendent jurisdiction over the state law claims brought herein under Wisconsin state law.

3. Venue is proper in that Defendants, ALTEC International Limited Partnership, Chart Industries, Inc., and ALTEC International Limited Partnership Pension Plan and Trust for Hourly Employees conduct substantial business in the State of Wisconsin, and the acts constituting the violations of law alleged herein were accomplished through contact with the Plaintiffs in La Crosse County in the Western District of Wisconsin.

JURISDICTIONAL PREREQUISITES

4. At all times relevant hereto, Plaintiffs were employees, participants, and/or beneficiaries covered by the provisions of ERISA.

5. At all times relevant hereto, Defendant, ALTEC International Limited Partnership, was an employer and fiduciary subject to the provisions of ERISA, held a duty to the Plaintiffs to act solely in the interest of the participants and beneficiaries, and was exercising "discretionary authority" respecting the ERISA plan's "management" or "administration" within the meaning of ERISA §3(21)(A).

6. At all times relevant hereto, the ALTEC International Limited Partnership Pension Plan and Trust for Hourly Employees was an employee pension benefit plan governed by ERISA.

7. This action is a civil action where issues of law and fact herein involve a federal question under the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 832, as amended, 29 U.S.C. §1001 *et seq.*

PARTIES

8. Plaintiff, James Spangler, was at all times relevant to this Complaint, an adult individual residing at 3354 East Avenue South, La Crosse, Wisconsin.

9. Plaintiff, Harold Danielson, was at all times relevant to this Complaint, an adult individual residing at W1526 County Road T, Mindoro, Wisconsin.

10. Plaintiff, Donald Melcher, was at all times

relevant to this Complaint, an adult individual residing at 2505 Hoeschler Drive, La Crosse, Wisconsin.

11. Plaintiff, Ray Janisch, was at all times relevant to this Complaint, an adult individual residing at W5820 Janisch Road, Stoddard, Wisconsin.

12. Plaintiff, Wayne Bielefeldt, was at all times relevant to this Complaint, an adult individual residing at W5410 CTH B, La Crosse, Wisconsin.

13. Plaintiff, Keith Huber, was at all times relevant to this Complaint, an adult individual residing at 1507 Viking Avenue, Holmen, Wisconsin.

14. Plaintiff, Emil Potaracke, was at all times relevant to this Complaint, an adult individual residing at 1927 South 21st Terrace, La Crosse, Wisconsin.

15. Plaintiff, William Hutschenreuter, was at all times relevant to this Complaint, an adult individual residing at 912 South 16th Street, La Crosse, Wisconsin.

16. Plaintiff, Roderick Sand, was at all times relevant to this Complaint, an adult individual residing at 3027 Scarlett Drive, La Crosse, Wisconsin.

17. Plaintiff, Gordon Stenslien, was at all times relevant to this Complaint, an adult individual residing at 300 Elm Drive, Stoddard, Wisconsin.

18. Plaintiff, Robert Clark, was at all times relevant to this Complaint, an adult individual residing at RR 3, W5585 #9, La Crosse, Wisconsin.

19. Plaintiff, Robert Taylor, was at all times relevant to this Complaint, an adult individual residing at 2513 Second Avenue East, La Crosse, Wisconsin.

20. Plaintiff, Dale Christianson, was at all times relevant to this Complaint, an adult individual residing at N5549 Hole Road, West Salem, Wisconsin.

21. Plaintiff, David Goode, was at all times relevant to this Complaint, an adult individual residing at 608 South 8th, La Crosse, Wisconsin.

22. Plaintiff, Dennis Gerke, was at all times relevant to this Complaint, an adult individual residing at W4185 Highway 33, La Crosse, Wisconsin.

23. Plaintiff, Jerry Munyon, was at all times relevant to this Complaint, an adult individual residing at Route 2, Genoa, Wisconsin.

24. Plaintiff, Stanley Stugen, was at all times relevant to this Complaint, an adult individual residing at 428 West Franklin, West Salem, Wisconsin.

25. Plaintiff, Oswald Klomsten, was at all times relevant to this Complaint, an adult individual residing at 825 East Second, Trempealeau, Wisconsin.

26. Upon information and belief, Defendant, ALTEC International Limited Partnership, f/k/a ALTEC International, Inc., f/k/a ALBRAZE International, Inc. (hereinafter "ALTEC"), is a Delaware limited partnership having its principal place of business at 2191 Ward Avenue, La Crosse, Wisconsin 54601.

27. Upon information and belief, Defendant, Chart Industries, Inc. (hereinafter "Chart"), is a Delaware corporation having its principal place of business at 35555 Curtis Blvd., Eastlake, Ohio 44095.

28. Upon information and belief, Chart is a general partner of ALTEC, and/or Chart has substantially the same identity as ALTEC and/or exercised complete domination and control of the policy, business practices, and finances of ALTEC to such an extent that the entity of ALTEC had no separate mind, will or existence of its own, and/or ALTEC was undercapitalized, and as such, Chart as a general partner or parent/successor corporation is liable for the acts and omissions of ALTEC as set forth herein.

29. Upon information and belief, Defendant, ALTEC International Limited Partnership Pension Plan and Trust for Hourly Employees (hereinafter "ALTEC Plan"), is, and at all times relevant hereto was, an employee pension benefit plan as defined under Section 3(2) of ERISA, having its principal place of business at 2191 Ward Avenue, La Crosse, Wisconsin 54601. The registered agent for the ALTEC Plan is The Plan Administrator, ALTEC International Limited Partnership, 2191 Ward Avenue, La Crosse, Wisconsin 54601.

30. Defendant ALTEC is an employer within the meaning of Section 3(5) of ERISA, a plan sponsor as defined under Section 3(16)(B) of ERISA, and held a fiduciary duty to the Plaintiffs, and was exercising "discretionary authority" respecting the Plan's "management" or "administration" within the meaning of ERISA §3(21)(A) in general and specifically in regard to the representations made to Plaintiffs about the benefits they would receive upon accepting

employment at ALTEC as set forth below.

FACTS

31. On or about January 8, 1957, the Plaintiff, James Spangler, began his employment with the Trane Company. While employed there, James Spangler was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

32. In or about 1953, the Plaintiff, Donald Melcher, began his employment with the Trane Company. While employed there, Donald Melcher was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

33. On or about October 11, 1955, the Plaintiff, Wayne Bielefeldt, began his employment with the Trane Company. While employed there, Wayne Bielefeldt was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

34. On or about April, 1980, the Plaintiff, Dale Christianson, began his employment with the Trane Company. While employed there, Dale Christianson was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical

Benefit Plan, and the Trane Company Dental Care Plan.

35. On or about November, 1969, the Plaintiff, Robert Clark, began his employment with the Trane Company. While employed there, Robert Clark was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

36. On or about December 1, 1951, the Plaintiff, Harold Danielson, began his employment with the Trane Company. While employed there, Harold Danielson was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

37. On or about February 11, 1974, the Plaintiff, Dennis Gerke, began his employment with the Trane Company. While employed there, Dennis Gerke was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

38. On or about May 23, 1973, the Plaintiff, David Goode, began his employment with the Trane Company. While employed there, David Goode was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

39. On or about February 4, 1974, the Plaintiff, Keith Huber, began his employment with the Trane Company. While employed there, Keith Huber was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

40. In or about 1954, the Plaintiff, William Hutschenreuter, began his employment with the Trane Company. While employed there, William Hutschenreuter was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

41. On or about July 30, 1951, the Plaintiff, Ray Janisch, began his employment with the Trane Company. While employed there, Ray Janisch was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

42. In or about 1950, the Plaintiff, Oswald Klomsten, began his employment with the Trane Company. While employed there, Oswald Klomsten was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

43. On or about May 10, 1960, the Plaintiff, Jerry

Munyon began his employment with the Trane Company. While employed there, Jerry Munyon was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

44. In or about 1950, the Plaintiff, Emil Potaracke, began his employment with the Trane Company. While employed there, Emil Potaracke was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

45. On or about June 22, 1960, the Plaintiff, Roderick Sand, began his employment with the Trane Company. While employed there, Roderick Sand was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

46. On or about June 13, 1960, the Plaintiff, Gordon Stenslien, began his employment with the Trane Company. While employed there, Gordon Stenslien was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

47. In or about 1956, the Plaintiff, Stanley Stugen, began his employment with the Trane Company. While employed there, Stanley Stugen was eligible for, and

participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

48. In or about April, 1964, the Plaintiff, Robert Taylor, began his employment with the Trane Company. While employed there, Robert Taylor was eligible for, and participated in, The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan.

49. Plaintiffs were employees of Trane Company prior to 1986. When plans were made for a spin-off company, ALTEC, to be formed and purchased by Arthur Holmes and/or Chart Industries, Inc., Plaintiffs were told in meetings that their skills and experience were so essential to the survival of ALTEC that unless they accepted employment with ALTEC, the company would not be viable and Arthur Holmes and/or Chart Industries, Inc., would not purchase ALTEC. Plaintiffs were induced to accept employment with ALTEC between 1986 and 1988 inclusive, with the promise by ALTEC that they would continue to receive the same level of benefits as if they had never left employment with Trane.

50. The representations of ALTEC, which were made in a fiduciary capacity, were untrue.

51. Upon information and belief, ALTEC made these untrue statements with the intent to induce and deceive Plaintiffs, and/or wantonly in reckless disregard of Plaintiffs' rights.

52. In reliance upon the representations regarding the benefits they would receive in accepting employment with ALTEC, Plaintiffs quit their employment at Trane and accepted employment with ALTEC.

53. As a result of the acts and omissions of the Defendants herein, the Plaintiffs have suffered the loss of pension, health care, life insurance, and vacation benefits.

CLAIM I
(ERISA §502(a)(3) - Breach of Fiduciary Duty)

54. Plaintiffs reallege and incorporate herein by reference all of the allegations contained in paragraphs 1 through 53 above, inclusive, with the same force and effect as though fully set forth and repeated herein.

55. Defendants, by inducing Plaintiffs to leave their employment with Trane to accept employment with ALTEC and in failing to provide benefits promised to Plaintiffs, breached their fiduciary obligations under ERISA §404 and otherwise violated the terms of ERISA.

56. As a direct and proximate result of Defendants' acts and omissions as set forth herein, which acts and omissions Plaintiffs first had actual knowledge of in or around 1995, Plaintiffs have suffered a loss of pension, health care, life insurance, and vacation benefits and/or have been forced to continue employment to maintain benefits which were otherwise due to them, and Plaintiffs have incurred other pecuniary losses, costs and attorneys fees.

CLAIM II
(ERISA §502(a)(1)(B) -

Declare & Enforce Rights Under Plan)

57. Plaintiffs reallege and incorporate herein by reference all of the allegations contained in paragraphs 1 through 56 above, inclusive, with the same force and effect as though fully set forth and repeated herein.

58. Plaintiffs were entitled to certain rights and benefits under The Trane Company Pension Plan for La Crosse Hourly-Rated Employees, The Trane Company Life Insurance Plan, The Trane Company Medical Benefit Plan, and the Trane Company Dental Care Plan, and would have retained such rights and benefits but for the representations of ALTEC.

59. Plaintiffs are now entitled to certain rights and benefits under the ALTEC Plans.

60. Defendants have wrongly denied rights and benefits to Plaintiffs under such plans, and any further efforts to receive such rights and benefits have been futile.

61. As a direct and proximate result of Defendants' acts and omissions as set forth herein, which acts and omissions Plaintiffs first had actual knowledge of in or around 1995, Plaintiffs have suffered a loss of pension, health care, life insurance, and vacation benefits and/or have been forced to continue employment to maintain benefits which were otherwise due to them, and Plaintiffs have incurred other pecuniary losses, costs and attorneys fees.

CLAIM III
(ERISA Federal Common Law - Estoppel)

62. Plaintiffs reallege and incorporate herein by reference all of the allegations contained in paragraphs 1 through 61 above, inclusive, with the same force and effect as though fully set forth and repeated herein.

63. ALTEC misrepresented material facts regarding the benefits available to Plaintiffs upon quitting employment at Trane and accepting employment at ALTEC.

64. ALTEC was aware that its representations to Plaintiffs were untrue.

65. ALTEC intended that the misrepresentations be acted on by Plaintiffs and/or had reason to believe Plaintiffs would rely on the misrepresentations.

66. Plaintiffs did not know, and had no reason to know, that the representations of ALTEC were untrue.

67. Plaintiffs reasonably and detrimentally relied on the misrepresentations of ALTEC.

68. As a direct and proximate result of Defendants' acts and omissions as set forth herein, which acts and omissions Plaintiffs first had actual knowledge of in or around 1995, Plaintiffs have suffered a loss of pension, health care, life insurance, and vacation benefits and/or have been forced to continue employment to maintain benefits which were otherwise due to them, and Plaintiffs have incurred other pecuniary losses, costs and attorneys fees.

CLAIM IV
(Fraudulent Representations - Wis. Stat. §100.18)

69. Plaintiffs reallege and incorporate herein by reference all of the allegations contained in paragraphs 1 through 68 above, inclusive, with the same force and effect as though fully set forth and repeated herein.

70. Upon information and belief, Defendant, ALTEC, directly and positively represented to Plaintiffs and other members of the public, orally and by way of written materials, that in the event Plaintiffs would quit their employment with Trane and accept employment at ALTEC, Plaintiffs would continue to receive the same level of benefits as if they had never left employment with Trane Company.

71. ALTEC made the aforementioned statements with the intent to induce a contract with respect to employing Plaintiffs.

72. The statements were untrue, misleading and/or deceptive.

73. The aforementioned acts and omissions of ALTEC constitute fraudulent representations as is defined in Wis. Stat. §100.18.

74. As a direct and proximate result of ALTEC's fraudulent representations, which acts and omissions Plaintiffs first had actual knowledge of in or around 1995, Plaintiffs have suffered pecuniary loss as set forth above plus costs including reasonable attorneys' fees as provided for by Wis. Stat. §100.18(11)(b)2, in a sum sufficient to confer jurisdiction upon this Court.

CLAIM V

(Breach of Contract)

75. Plaintiffs reallege and incorporate herein by reference all of the allegations contained in paragraphs 1 through 74 above, inclusive, with the same force and effect as though fully set forth and repeated herein.

76. ALTEC offered and agreed that in the event Plaintiffs would quit their employment with Trane and accept employment at ALTEC, Plaintiffs would continue to receive the same level of benefits as if they had never left employment with Trane, including but not limited to, the same level of vacation benefits.

77. Plaintiffs accepted said offer, and said agreement was made with sufficient consideration.

78. Plaintiffs have performed all of the terms and conditions by them to be performed.

79. ALTEC has materially breached said agreement and has violated Wisconsin Statute §109.03, in that it has failed and refused to provide the benefits which it agreed to provide to Plaintiffs, including but not limited to, the same level of vacation benefits.

80. As a direct and proximate result of ALTEC's breach of contract and violation of Wisconsin Statute §109.03, Plaintiffs have sustained damages as heretofore alleged in a sum sufficient to confer jurisdiction on this Court.

CLAIM VI
(INTENTIONAL MISREPRESENTATION)

81. Plaintiffs reallege and incorporate herein by reference all of the allegations contained in paragraphs 1 through 80 above, inclusive, with the same force and effect as though fully set forth and repeated herein.

82. Upon information and belief, Defendant, ALTEC, directly and positively represented to Plaintiffs and other members of the public, orally and by way of written materials, that in the event Plaintiffs would quit their employment with Trane and accept employment at ALTEC, Plaintiffs would continue to receive the same level of benefits as if they had never left employment with Trane Company.

83. That the representations made by ALTEC were untrue.

84. Upon information and belief, ALTEC either knew such statements to be false, or spoke with reckless disregard as to whether its statements were true or false.

85. Upon information and belief, the representations were made by ALTEC knowing it had no sufficient basis or information to justify such statements in order to induce Plaintiffs to quit their employment with Trane and accept employment at ALTEC.

86. That as a direct and proximate result of the intentional misrepresentations made by ALTEC, which acts and omissions Plaintiffs first had actual knowledge of in or around 1995, Plaintiffs have sustained damages as heretofore alleged in a sum sufficient to confer jurisdiction on this Court.

CLAIM VII

(NEGLIGENT MISREPRESENTATION)

87. Plaintiffs reallege and incorporate herein by reference all of the allegations contained in paragraphs 1 through 86 above, inclusive, with the same force and effect as though fully set forth and repeated herein.

88. Upon information and belief, ALTEC did not exercise reasonable care in ascertaining the facts regarding the benefits it would provide to Plaintiffs and in conveying information concerning the benefits to the Plaintiffs.

89. That the representations made by ALTEC were untrue.

90. As a direct and proximate result of ALTEC's negligent misrepresentations, which acts and omissions Plaintiffs first had actual knowledge of in or around 1995, Plaintiffs have sustained damages as heretofore alleged in a sum sufficient to confer jurisdiction on this Court.

CLAIM VIII
(STRICT RESPONSIBILITY MISREPRESENTATION)

91. Plaintiffs reallege and incorporate herein by reference all of the allegations contained in paragraphs 1 through 90 above, inclusive, with the same force and effect as though fully set forth and repeated herein.

92. Upon information and belief, ALTEC made representations of fact that in the event Plaintiffs would quit their employment with Trane and accept employment at ALTEC, Plaintiffs would continue to receive the same level of benefits as if they had never left employment with Trane.

93. Such representations of fact were untrue.

94. Upon information and belief, ALTEC made such representations of fact based upon personal knowledge or in circumstances in which it necessarily ought to have known the untruth of the representations.

95. ALTEC had an economic interest in getting Plaintiffs to accept employment with ALTEC.

96. Plaintiffs believed the representations made by ALTEC concerning benefits and relied upon said representations.

97. As a direct and proximate result of ALTEC's misrepresentations, which acts and omissions Plaintiffs first had actual knowledge of in or around 1995, Plaintiffs have sustained damages as heretofore alleged in a sum sufficient to confer jurisdiction on this Court.

WHEREFORE, Plaintiffs demand the following:

A. Compensatory damages, together with interest on said sum;

B. In the event the court does not award compensatory damages, injunctive relief and restoration of the benefits promised by the Defendants;

C. Punitive damages, together with interest on said sum;

D. Costs, disbursements, and reasonable attorney's fees of this action;

E. Any other just and equitable relief as the Court may deem fit.

TWELVE PERSON JURY TRIAL REQUESTED ON CLAIMS IV - VIII.

Dated this 2nd day of October, 1997.

O'KEEFE JACOBSON
TRIAL LAWYERS S.C.

BY:_____

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APPENDIX H

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
APPEAL NO. 98-2437**

**APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF WISCONSIN
CASE NO.: 97 C 0338 C**

**JAMES SPANGLER ET AL.,
PLAINTIFFS-APPELLANTS,**

VS.

**ALTEC INTERNATIONAL LIMITED
PARTNERSHIP ET AL.,
DEFENDANTS-APPELLEES.**

**BRIEF OF DEFENDANTS-APPELLEES
CHART INDUSTRIES, INC., ALTEC
INTERNATIONAL LIMITED PARTNERSHIP, AND
ALTEC INTERNATIONAL LIMITED PARTNERSHIP
PENSION PLAN AND TRUST FOR HOURLY
EMPLOYEES**

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Attorneys for Defendant-Appellee Chart Industries, Inc.

3. The Employees Were Given Numerous Documents Regarding ALTEC's Benefits Program

The employees were never told ALTEC would pay them the difference between the pension multiplier when they left Trane and ALTEC's multiplier. Moreover, after ALTEC's acquisition of the Trane Plant, the Employees were given numerous documents over the years that detailed the exact scope of ALTEC's benefits program. For example, in February of 1986, ALBRAZE published a Benefits Highlights booklet for the hourly Union employees. (See Deposition Exhibit No. 6, ALBRAZE International Benefits Highlights (Hourly Union) (Feb. 1986), Supp. App. At 98-128.)[4] This document clearly states that ALBRAZE Pension Plan benefits were based upon years of service with ALBRAZE.

Pension benefit at age 65	your monthly pension benefit will be $17 *times your years of service with ALBRAZE*

(Id. at 7 (emphasis added).)

The February 1986 Benefits Highlights booklet was distributed to all of the ALBRAZE hourly Union employees. (See Affidavit of George Snapp ¶ 6, Supp. App. at 96.) Some of the Employees actually admitted that they received

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[4]The Employees' version of this document, found at pages 40-60 of their Appendix, conveniently omits the cited pages. A true and correct copy of Deposition Exhibit 6 is included in Appellees' Supplemental Appendix.

this document. (See, e.g., Plaintiff Robert Clark's Responses to ALTEC's Discovery, Request for Admission No. 11, Supp. App. at 4.) Others did not recall receiving the benefits booklet. (See, e.g., Plaintiff Keith Huber's Responses to Defendant ALTEC's Discovery, Request for Admission No. 11, Supp. App. at 10.) Still others denied that they ever received such a booklet. (See, e.g., Plaintiff David Goode's Responses to ALTEC's Discovery, Request for Admission No. 11, Supp. App. at 16.)

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JAMES SPANGLER, DONALD MELCHER,
WAYNE J. BIELEFELDT, ET AL.,

Petitioners-
Plaintiffs-Appellants,

v.Appeal No. 98-2437

ALTEC INTERNATIONAL LIMITED
PARTNERSHIP, CHART INDUSTRIES,
INC. and ALTEC INTERNATIONAL
LIMITED PARTNERSHIP PENSION PLAN
AND TRUST FOR HOURLY EMPLOYEES,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin
Case No. 97 C 0338 C
The Honorable Barbara B. Crabb, Presiding

PETITION FOR REHEARING

(Tables omitted)

Petitioners-Plaintiffs-Appellants hereby petition that their appeal be reheard pursuant to Fed. R. App. P. 40 on the grounds that there are points of law and fact which the court has overlooked and misapprehended within the meaning of Fed. R. App. P. 40. The basis for this petition will be set forth more fully in the remainder of this petition.

PROOFS AND POINTS OF FACT AND LAW APPARENTLY OVERLOOKED OR MISAPPREHENDED BY THE COURT

1. The court has overlooked and misapprehended the facts of record which support Petitioners-Plaintiffs-Appellants' position herein. Without question, for purposes of this appeal, the record does support the Petitioners-Plaintiffs-Appellants employees' position and argument that in 1985 and 1986 Altec represented and assured the employees that they would not lose any Trane Company benefits if they transferred to Altec. Altec officials represented that the employees' benefits would not change from the Trane Company benefits.

Altec, also, did, in 1986, distribute documents to the employees that showed Altec employee benefit calculations; nevertheless, these documents, in no manner whatsoever indicated that the benefit calculations and information in the documents applied to the former Trane employees. Based upon the representations made by Altec, Petitioners-Plaintiffs-Appellants employees had absolutely no reason to believe that the pension calculations in the documents served any purpose other than as a comparison between what non-former Trane employees would receive versus what the

Trane employees would receive from Altec. Nothing in these documents therefore gave the former Trane Company employees any reason to believe that their benefits would be anything other than as had been represented by the Altec officials in 1985 and 1986.

Because of what the Petitioners-Plaintiffs-Appellants were told, there are issues of fact on whether the Petitioners-Plaintiffs-Appellants reasonably believed the written documents did not apply to them, a special group being persuaded to join Altec. Since the Petitioners-Plaintiffs-Appellants constituted this special group, there was not a conflict between what they were promised and the written plan covering employees who were not part of that special group. The Court's finding there was a conflict indicates the Court overlooked the special status the Petitioners-Plaintiffs-Appellants reasonably believed they would enjoy.

Accordingly, the Court of Appeals, in its subject decision on page 2, misapprehends the facts when it states that "In 1986, Altec distributed documents to its employees (including those formerly employed by Trane) detailing how their pension benefits would be calculated, which made clear that only years worked for Altec would be used in calculating pension benefits." When the facts are viewed most favorably toward Petitioners-Plaintiffs-Appellants herein, that is not a finding of fact that should be drawn from the record.

The documents provided did not conflict with Petitioners-Plaintiffs-Appellants' understanding of what their rights would be and did not conflict with the representations of the Altec officials. Petitioners-Plaintiffs-Appellants believed that the documents provided a comparison of what

non Trane Company Altec employees would receive vis-a-vis what the former Trane Company employees would receive from Altec. Thus, the oral representations did not conflict with the plan, so that the factual assumptions made by the Court as quoted above is a misapprehension of the facts.

2. Under the applicable law, the Court of Appeals has mistakenly misapprehended a *Varity Corp. v. Howe*, 516 U.S. 489, 116 S.Ct. 1965 (1996) breach of fiduciary duty cause of action as akin to an intentional misrepresentation cause of action. However, the present case is not, per se, an intentional misrepresentation cause of action. Neither *Varity*, supra., nor any other known case has limited such breaches of fiduciary duty claims to intentional misrepresentation claims. For that matter, neither does Defendants-Appellees' Brief.

It is factually correct that the subject claims are predicated upon the fact that representations were made in 1985 and 1986 as to what the nature and extent of the benefits that the Trane Company employees would receive if they transferred to Altec. However, it was not until when it came time to first perform in accordance with those representations, that Defendants-Appellees first failed to perform in accordance with their prior representations. Only then could Altec have breached its fiduciary duties to perform in accordance with its prior representations. The 1985 and 1986 representations created the fiduciary duties to perform. These duties were not breached until there was the failure to perform. Petitioners-Plaintiffs-Appellants respectfully submit that under the existing case law, including *Varity*, this, is the only reasonable way to construe when a *Varity* breach occurred herein. The Argument as

hereinafter set forth will more fully discuss this point. Therefore, to view the claimed breach of fiduciary duty as analogous to an intentional misrepresentation misapprehends when the fiduciary duty breach occurred in this case.

3. Finally, based upon the facts of record construed most favorably in support of the Petitioners-Plaintiffs-Appellants herein, the Court of Appeals has apparently overlooked the effect and ramifications of this holding. The subject representations made by Altec officials to Petitioners-Plaintiffs-Appellants were made in 1985 and 1986. Petitioners-Plaintiffs-Appellants, thereafter had no knowledge or notice whatsoever of any breach or failure to perform in accordance with promises until late 1994. Therefore, under the Court of Appeals' analysis in its decision, Petitioners-Plaintiffs-Appellants' cause of action ran in 1992; however, this 1992 date is over two years before any Petitioner-Plaintiff-Appellant had any indication whatsoever that there had been or would possibly be any breach of any duty by Altec. Under the Court of Appeal's decision, nevertheless, the Petitioners-Plaintiffs-Appellants lost a right to bring this action before they had any basis to conclude that such a right existed. The ramification this has for the litigants herein and future litigants if this is in fact how a *Varity* breach is interpreted, has potentially extreme inequitable ramifications and will cause extreme unfairness in contravention of ERISA policy.

ARGUMENT

I. THE COURT MISAPPREHENDS PETITIONERS-PLAINTIFFS-APPELLANTS' BREACH OF FIDUCIARY DUTY CAUSE OF ACTION AGAINST DEFENDANTS-

APPELLEES AS A MISREPRESENTATION CAUSE OF ACTION. THUS, THE COURT ERRONEOUSLY CONCLUDES THAT THE BREACH OCCURRED AT THE TIME PETITIONERS-PLAINTIFFS-APPELLANTS ACTED IN RELIANCE UPON ALTEC'S REPRESENTATIONS.

As has been repeatedly noted, Petitioners-Plaintiffs-Appellants contend that in 1985 and 1986 Altec officials made specific representations to the Petitioners-Plaintiffs-Appellants as to the nature and extent of what their pension benefits would be if the employees joined Altec. However, the breach of fiduciary duty cause of action does not depend on whether or not the representations made at that time were intended to be misrepresentations. Whether there were misrepresentations or representations in 1985 and 1986 is not material to any issue before the Court. The material issue is that these representations created a fiduciary duty on the part of Altec to abide by and act in accordance with the representations made. For this reason, there can be no breach of that fiduciary duty until Altec, in fact, failed to perform in accordance with the promises made. This, clearly the record shows, did not occur until 1994.

Similarly, Petitioners-Plaintiffs-Appellants therefore do not contend the oral promises conflicted with the written documents. The written documents do not apply to Petitioners-Plaintiffs-Appellants. In fact, Petitioners-Plaintiffs-Appellants submit that the case law including *Varity Corp. v. Howe*, 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996) supports Petitioners-Plaintiffs-Appellants' arguments herein and that the Court has misapprehended the law as set forth in *Varity*. In discussing

the breach of fiduciary duty cause of action that the Plaintiffs in *Varity* pursued vis-a-vis the remedies available to the Plaintiffs, the Supreme Court in *Varity* specifically characterized "a denial of benefits as a breach of fiduciary duty," see *Varity* at 516 U.S. 514, 116 S.Ct. 1079. This language was overlooked by this Court.

From the above *Varity* quote, it is evident that the Supreme Court also recognized that the breach of fiduciary duty occurs when the denial of benefits occurs, **not** when the representations were first made.

To further understand this logic, consider the following hypothetical. Assume that in 1985 and 1986 the oral representations had been reduced formally to a written plan that was then given to the employees. Further assume that Altec, in 1994, began to pay benefits that conflicted with the written plan.

Presumably, in such a case, the Court of Appeals would consider that in a breach of fiduciary duty claim, the cause of action would occur when the failure to perform occurred. The plan created the duty, and the duty was breached when there was a failure to perform. The Petitioners-Plaintiffs-Appellants' cause of action, herein, is not substantially different from this hypothetical.

The Court of Appeals in *Meagher v. International Association of Machinists and Aerospace Workers Pension Plan*, 856 F.2d 1418 (9th Cir. 1988) has applied similar logic. This case also addressed the application of the statute of limitations to a breach of fiduciary duty cause of action under ERISA; in doing so, *Meagher* held that the six-year statute of limitations provision pursuant to 29 U.S.C. §1113

began to accrue with the issuance of each check that was not in accordance with the benefits to which the Plaintiff was entitled. "Thus, the issuance of each check commenced a six-year period. . ." See *Meagher* at 856 F.2d 1418, 1423. For similar holdings see also *Tolle v. Carroll Touch, Incorporated*, 977 F.2d 1129, 1139 (7th Cir. 1992).

In addition, the following quote from *Starr v. JCI Data Processing, Inc.*, 767 F.Supp. 633, 637-638 (N.J. 1991) is also in accord with the above discussed holdings and logic:

> In the absence of actual knowledge, § 1113 mandates application of a limitations period of six years after the date of the last action constituting part of the breach or, in the case of omission, the latest date on which the fiduciary could have cured the breach or violation. (For applications see, e.g., Davidson v. Cook, 567 F.Supp. 225, 234 (E.D.Va.1983), aff'd, 734 F.2d 10 (4th Cir.1984), cert. denied, Accardi v. Davidson, 469 U.S. 899, 105 S.Ct. 275, 83, L.Ed.2d 211 (1984) (last action was last disbursement of funds pursuant to loans made not in interest of plan beneficiaries); Buccino v. Continental Assur. Co., 578 F.Supp. 1518, 1521 (S.D.N.Y.1983) (last action was last time fund was injured by making premium payment due to fiduciaries' failure to advise fund to divest itself of unlawful or imprudent investments).) This language is unusually broad in allowing employees to pursue their claims in a timely fashion while hampering an employer's effort to hide behind a time bar. Thus, the language

> comports with Congress' intent in ERISA " 'to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective ... recovery of benefits due to participants.' " S.REP. NO. 127, 93d Cong., 1st Sess. 35 (1973), quoted in Connors v. Hallmark & Son Coal Co., 935 F.2d 336 (D.C.Cir.1991).

Petitioners-Plaintiffs-Appellants acknowledge that their breach of fiduciary duty cause of action is a tort. However, that does not change the fact that under a *Varity* type of breach of fiduciary duty cause of action that the breach occurred when there was a failure to perform, which is also, in this case, when the harm occurred. In the Wisconsin Supreme Court case of *Pritzlaff v. Arch Diocese of Milwaukee*, 194 Wis.2d 302, 315, 533 N.W.2d 780, 785 (1995) which discussed generally when tort causes of action accrue, the following was saliently stated:

> [5] [6] [7] It is well settled that a cause of action accrues when there exists a claim capable of enforcement, a suitable party against whom it may be enforced, and a party with a present right to enforce it. *Meracle v. Children's Serv. Socy.*, 149 Wis.2d 19, 437 N.D.2d 532 (1989); *Barry v. Minahan*, 127 Wis. 570, 573, 107 N.W. 488 (1906). A party has a present right to enforce a claim when the plaintiff has suffered actual damage, defined as harm that has already occurred or is reasonably certain to occur in the future.

This is a general principle that applies to the issue of

when all tort actions accrue; it is therefore equally applicable to the tort cause of action that Petitioners-Plaintiffs-Appellants allege in the present case. This is, and has been, Petitioners-Plaintiffs-Appellants' argument in this case as to when the cause of action accrued. Thus, Petitioners-Plaintiffs-Appellants respectfully submit that the Court of Appeals has misapprehended the applicable facts and the law of this case by concluding that the six-year statute of limitations under 29 U.S.C. §1113 began to run at the time the representations were made in 1986 or when the Petitioners-Plaintiffs-Appellants acted in reliance on these representations. The statute of limitations did not, and could not, begin to run until there was the "denial of the benefits" (see *Varity*, supra.). This did not occur until 1994.

II. THE COURT'S DECISION APPARENTLY OVERLOOKS THE INEQUITABLE AND UNFAIR EFFECT AND RAMIFICATIONS ITS HOLDING HAS UPON PETITIONERS-PLAINTIFFS-APPELLANTS HEREIN AND OTHER LITIGANTS WHO MIGHT BE THE VICTIM OF *VARITY* BREACH OF FIDUCIARY DUTY CLAIMS.

As noted in *Starr v. JCI Data Processing, Inc.* at 767 F.Supp. 633, 638: "... Congress' intent in ERISA "[is] 'to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective ... recovery of benefits due to participants.' " S.REP. NO. 127, 93d Cong., 1st Sess. 35 (1973), quoted in Connors v. Hallmark & Son Coal Co., 935 F.2d 336 (D.C.Cir.1991)."

From this, it is clear that one policy goal of ERISA is to remove the hurdles that have prevented employee and

benefit plan litigants from enforcing their rights to pension and other benefits.

Petitioners-Plaintiffs-Appellants respectfully submit that in view of this set forth policy, the ultimate effect of the Court's decision in this case is to permit employers and benefit plan administrators to make representations and promises to employees and plan participants as to the nature and extent of benefits and yet not abide by those promises if six years pass and if in the interim, the employees could not learn that there will not be performance in accordance with the representations made. Under the Court's holding, if six years have passed since the time of the representations, regardless of the circumstances, the participants, the innocent victims, would be left with no recourse despite the fact that they had no knowledge until the time the benefits actually accrued and performance was required. The effect is that the plan participants such as the Petitioners-Plaintiffs-Appellants in the present case have lost their rights to bring an action categorically before they even knew that there was a right to pursue. It is submitted that this is in direct contravention of the above espoused ERISA policy.

This holding therefore has potentially momentous ramifications, not only to the parties in the present case, but to any and all other plan participants who might be victims of *Varity* type breaches of fiduciary duties. Again, in the present case, the fact is that if the Court of Appeals decision stands, the parties are left in a circumstance where representations were made in 1985 and 1986. The earliest any participant was aware that any wrong had, or would, occur to them in violation of Altec's fiduciary duties to Petitioners-Plaintiffs-Appellants was in 1994. If they were not aware of the wrong that occurred, they surely would not

be aware that there was any basis to bring any type of claim whatsoever to enforce their rights. Thus, effectively what has transpired, if this decision is not reheard and reconsidered, would be that the subject employees lost their rights to bring this action before there was any knowledge whatsoever that such a right existed. The patent unfairness and inequity of this cannot be understated. This is particularly true in view of the policy provisions as is set forth above.

In view of this fact also, it is respectfully submitted that the Court of Appeals rehear the subject claims of the Petitioners-Plaintiffs-Appellants herein. The ramifications and extent of this holding have been apparently overlooked by the Court.

CONCLUSION

It is respectfully submitted that both the District Court, and the Court of Appeals have apparently overlooked and misapprehended the applicable facts and law in the present case and have not fully considered the ramifications of the decision in view of the facts. For these reasons, it is requested that this Petition for Rehearing be granted.

Respectfully submitted,

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No. 98-1820

In The

Supreme Court of the United States

JAMES SPANGLER ET AL.,

Petitioners,

vs.

ALTEC INTERNATIONAL LIMITED PARTNERSHIP ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Was the court of appeals correct in its holding that the statute of limitations set forth in section 413(1)(a) of ERISA, 29 U.S.C. § 1113(1)(a), begins to run on *Varity*-type breach of fiduciary duty claims when the plaintiff detrimentally relies on the misrepresentation upon which his breach of fiduciary duty claims are based?

PARTIES TO THE PROCEEDING

Respondent Chart Industries, Inc. ("Chart") is publicly-traded over the New York Stock Exchange. Respondent ALTEC International Limited Partnership is a wholly-owned subsidiary of Chart.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF BASIS FOR JURISDICTION 1

A. Date of Judgment 1

B. Jurisdiction 1

STATUTE AT ISSUE 1

STATEMENT OF THE CASE 1

A. Procedural Background 1

B. Factual Background 4

1. The Employee "Loan" Agreement 4

2. The Employees Were Given Numerous Documents Regarding ALTEC's Benefits Program .. 6

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED 6

ERISA's Statute of Limitations 7

1. The Employees' Cause of Action Arose in 1988 at the Latest and is Time-Barred 9

2. The Cases Cited By The Employees Do Not Support Their Claim That Their Causes of Action Accrued in 1994 11

TABLE OF CONTENTS – Continued

Page

3. Petitioners' Trust Law Analysis Lends No Support To Their Claims 13

4. The Court of Appeals' Decision Promotes Equitable and Just Results 14

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Gluck v. Unisys Corp., 960 F.2d 1168 (3d Cir. 1992) 9

Larson v. Northrop Corp., 21 F.3d 1164 (D.C. Cir. 1994) 9, 10

Librizzi v. The Children's Memorial Medical Center, 134 F.3d 1302 (7th Cir. 1998) 9, 10

Meagher v. International Ass'n of Machinists and Aerospace Workers Pension Plan, 856 F.2d 1418 (9th Cir. 1988) 11, 12

Spangler v. ALTEC Int'l Limited Partnership, No. 97 C 0338 C, slip op. at 7 (W.D. Wis. Apr. 13, 1998) ... 2, 3

Spangler v. ALTEC Limited Partnership et al., No. 98-2437, slip op. at 7 (7th Cir. Feb. 9, 1999) ... 3, 4, 5

Starr v. JCI Data Processing Inc., 767 F.Supp. 633 (D. N.J. 1971) 12

Varity v. Howe, 116 S.Ct. 1065 (1996) 11

Wolin v. Smith Barney, Inc., 83 F.3d 847 (7th Cir. 1996) 10

Ziegler v. Connecticut General Life Ins. Co., 916 F.2d 548 (9th Cir. 1990) 12

STATUTES

ERISA § 2 (a), 29 U.S.C. § 1001 (a) 14

ERISA § 203(a); 29 U.S.C. § 1053(a) 5

ERISA § 413, 29 U.S.C. § 1113 ..... 1, 2, 8

ERISA section 404, 29 U.S.C. § 1104 2

ERISA section 413(1)(A), 29 U.S.C. § 1113(1)(A) 8

TABLE OF AUTHORITIES – Continued

Page

ERISA section 413(a), 29 U.S.C. § 1113(a) 6

ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) 7

ERISA section 502(e), 29 U.S.C. § 1132(e) 2

STATEMENT OF BASIS FOR JURISDICTION

A. Date of Judgment

The United States Court of Appeals for the Seventh Circuit entered the judgment at issue here on February 9, 1999. Petitioners filed a petition for rehearing with the Seventh Circuit, which was denied on March 12, 1999.

B. Jurisdiction

This is a discretionary appeal pursuant to 28 U.S.C. § 1254(1).

STATUTE AT ISSUE

ERISA section 413(1)(a), 29 U.S.C. § 1113(1)(a).

STATEMENT OF THE CASE

A. Procedural background

The Petitioners are 18 current and former employees of Respondent ALTEC International Limited Partnership ("ALTEC"). Petitioners (hereinafter referred to as the "Employees") worked for Plant 3 of the Trane Company's ("Trane") Brazed Aluminum Products Division in 1986, when it was sold to Arthur and Charles Holmes, principal stockholders of Appellee Chart Industries, Inc. ("Chart"), ALTEC's parent company. (Amended Complaint ¶ 49, Appendix of the Petitioners ("App.") at 61.) At that time, ALTEC was known as ALBRAZE International, Inc. ("ALBRAZE"). (Complaint ¶ 1, App. at 52.)

On May 13, 1997, the Employees filed suit in the United States District Court for the Western District of Wisconsin, asserting claims of breach of fiduciary duty under the Employee Retirement Income Security Act ("ERISA") section 404, 29 U.S.C. § 1104; for a declaration and enforcement of certain rights to which the Employees claim to have been entitled under employee benefits plans sponsored by ALTEC; and numerous state law claims. Jurisdiction was proper in the district court pursuant to ERISA section 502(e), 29 U.S.C. § 1132(e), which gives the United States District Courts exclusive jurisdiction over all actions relating to employee benefits plans. Respondents ALTEC and Chart, along with Respondent the ALTEC International Limited Partnership Pension Plan and Trust ~~for~~ Hourly Employees (the "Plan"), moved for summary judgment in their favor as to all claims asserted against them, with the exception of the vacation pay claims asserted by Employees David Goode, Dale Christianson, and Keith Huber.

On April 13, 1998, the District Court issued an Opinion and Order finding that the Employees' state law claims of fraudulent representation, breach of contract, intentional misrepresentation, negligent misrepresentation, and strict responsibility misrepresentation were preempted by ERISA. (*Spangler v. ALTEC Int'l Limited Partnership*, No. 97 C 0338 C, slip. op. at 7 (W.D. Wis. Apr. 13, 1998), App. at 18.) The District Court held that the Employees' claims for breach of fiduciary duty under ERISA were barred by the statute of limitations set forth in section 413 of ERISA, 29 U.S.C. § 1113, finding that "the last actions constituting the breach [of fiduciary duty] occurred in 1985 and 1986." (*Spangler*, No. 97 C

0338 C, slip. op. at 8, App. at 19.) The District Court further held that the Employees' estoppel and denial of benefits claims were based on alleged oral representations that contradicted the written terms of the Plan, and that Chart, ALTEC, and the Plan were therefore entitled to the entry of summary judgment in their favor on those claims.

The District Court denied Respondents' Motion for Summary Judgment with respect to the Employees' state-law based vacation pay claims. The District Court declined to retain jurisdiction over the Employees' remaining state-law claims, and those claims were dismissed.

The Court of Appeals for the Seventh Circuit affirmed the District Court's decision on February 9, 1999. The Seventh Circuit held that the last actions constituting a part of the Respondents' breaches of fiduciary duty occurred when the Employees acted in reliance on the alleged misrepresentations – namely, the Employees' transfers to employment with ALBRAZE/ALTEC in 1986 through 1988. (*Spangler v. ALTEC Limited Partnership et al.*, No. 98-2437, slip op. at 7 (7th Cir. Feb. 9, 1999), App. at 7-8.) The Seventh Circuit's analysis differed somewhat from the District Court's in this respect: the District Court had held that the last action constituting a breach occurred in 1986 when the alleged misrepresentation occurred. Petitioners filed a petition for rehearing by the Seventh Circuit, which was denied on March 12, 1999. (App. at 11.)

B. Factual Background

The material facts of this case are not in dispute. All facts were construed in Petitioners' favor by the trial court and court of appeals.[1] The following factual summary was derived primarily from the Petitioners' depositions and their responses to Respondents' interrogatories and document production requests.

The Employees worked for Trane Plant 3 when it was purchased by Arthur and Charles Holmes, Chart's principal stockholders. The Employees claim that they were induced to leave their jobs as Trane welders and accept employment with ALBRAZE, now known as ALTEC, with the promise that they would *"not lose anything"* from their Trane benefits. (*Spangler v. ALTEC Int'l Limited Partnership*, No. 98-2437, slip op. at 1-2 (7th Cir. Feb. 9, 1999), App. at 2-3.)

1. The Employee "Loan" Agreement

In negotiating the purchase of Trane Plant 3, Mr. Holmes struck an agreement with Trane whereby Trane agreed to loan the majority of its personnel who worked in the Plant, including the Employees, to ALBRAZE for at least two years. (*Id.*; App. at 2-3.) During the loan period, the loaned individuals were to remain employed by

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[1] The Petitioners statement of facts has become more and more exaggerated as this case has progressed through the judicial system. Petitioners have grossly misstated the evidence that has been adduced in this case. As it happens, however, these misstatements are of no consequence to the determinant issues of the case.

Trane, and would retain all their seniority and benefits with Trane. (*Id.*; App. at 2-3.)

ALTEC representatives began attempting to persuade the Employees and the other Plant 3 workers scheduled to be loaned to ALTEC to leave their employment with Trane and work permanently for ALTEC. The Employees assert that they relied on statements made in one or more meetings, held over ten years ago, to support their claims in this case that they were told they would "not lose anything" from their Trane benefits. (*Id.* at 3; App. at 3.)

The Seventh Circuit held that the Employees actually *did not lose anything* in terms of their Trane pension benefits by going on loan and eventually transferring their employment to ALTEC. All of the Employees were vested in their Trane pensions, meaning that each Employee's Trane pension benefits were non-forfeitable. *See* ERISA § 203(a); 29 U.S.C. § 1053(a); *Spangler*, No. 98-2437 at 3, App. at 3. The Employees' pension claims in this action are based upon the fact that, *after the Employees left their employment with Trane*, Trane increased its pension multiplier. The Employees asserted with this lawsuit that ALTEC should contribute to the Employees' pensions for their years of service at *Trane*. The Employees want ALTEC to make up the difference between the pension multiplier per month per year of service that was offered at the time they left Trane ($16.00 or $17.00, depending upon the date of each Employee's retirement from Trane) and the pension multiplier that is now offered at ALTEC. (*Spangler*, No. 98-2437 at 3-4; App. at 3-4.)

2. The Employees Were Given Numerous Documents Regarding ALTEC's Benefits Program

The Seventh Circuit upheld the District Court's finding that, in 1986, the Employees were given numerous documents that detailed the exact scope of ALTEC's benefits program. The documents made clear that only years worked for ALTEC would be used in calculating pension benefits. (*Id.* at 4; App. at 4.) Nevertheless, the Employees claim that not until October 1994 did they realize that their pensions from ALTEC would be different from what they expected. The Employees filed suit in May of 1997. (*Id.* at 4; App. at 4.)

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

Contrary to Petitioners' representations, the Seventh Circuit's decision holding that the Employees' claims were barred by the ERISA statute of limitations set forth in ERISA section 413(a), 29 U.S.C. § 1113(a), is consistent with the decisions of this Court and other courts of appeal and is equitable. The Seventh Circuit decided this case correctly in a well-reasoned, lengthy opinion. No conflict exists in the circuits on the issue presented by this case. In short, there is absolutely no reason for this Court to exercise its discretion to review this case.

In fact, not one of the cases cited by Petitioners in their brief actually provides support for Petitioners' claims that the Seventh Circuit's decision conflicts with prior decisions of this Court or other courts. Even more conspicuous is the Petitioners' total failure to address any

of the cases relied upon by the Seventh Circuit in its decision below.

The ERISA statute of limitations requires that breach of fiduciary duty claims must be brought before the earlier of six years after the date of the last action constituting a breach *or* three years from the date a plaintiff has actual knowledge of the breach. The undisputed facts indicate (and the Seventh Circuit correctly concluded) that the last action constituting a part of any breach of fiduciary duty by the Respondents occurred in 1988 at the latest, more than six years before the Employees filed suit in the District Court (1997). The date the Employees were denied the benefits they claim to be due would only be relevant to an analysis of a contractually-based right to benefits claim. Petitioners did not appeal the District Court's decision on their contractual denial of benefits claims, which were properly dismissed because they conflicted with the written Plan terms.[2]

ERISA's Statute of Limitations

ERISA limits the time in which an action against a plan fiduciary for breach of fiduciary duty may be brought. It provides as follows:

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[2] Under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), a claim for denial of benefits may only be brought in order to enforce rights due to a participant or beneficiary under the written terms of a plan. The alleged misrepresentations upon which the Employees' denial of benefits claims were based conflicted with the express written terms of the Plan, and the District Court correctly held that Respondents were entitled to judgment in their favor on these claims.

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of – (1) six years after (A) the date of the last action which constituted a part of the breach or violation, (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

ERISA § 413, 29 U.S.C. § 1113.

Despite the numerous documents that ALTEC distributed to the Employees over the years, the Employees nevertheless claim that they did not have knowledge of any discrepancy between the benefits they expected, under the terms of Trane's plan, and the benefits they actually were to receive under the ALTEC Plan, until sometime in 1995. The Employees' actual knowledge or lack thereof aside, the Employees' claims are barred by the six-year statute of limitations in ERISA section 413(1)(A), 29 U.S.C. § 1113(1)(A).

The Seventh Circuit correctly held that the last act that constituted a part of the alleged breach of fiduciary duty – the Employees' decisions to transfer their employment from Trane to ALTEC/ALBRAZE – occurred in 1988 at the latest. Since more than six years passed between the last action constituting a part of the alleged breach of fiduciary duty and the filing of the Employees' lawsuit

with the District Court, the Employees' claims are barred by ERISA's statute of limitations.

1. The Employees' Cause of Action Arose in 1988 at the Latest and is Time-Barred.

The Seventh Circuit correctly concluded that a plaintiff alleging intentional misrepresentation has a viable cause of action when he or she acts in reliance on the misrepresentation. *See Librizzi v. The Children's Memorial Medical Center*, 134 F.3d 1302, 1307 (7th Cir. 1998). In *Librizzi*, the plaintiff filed suit based upon bad advice he received regarding his eligibility for disability benefits. The Seventh Circuit held that the "breach or violation" occurred when the bad advice was given or, at the latest, when the defendant failed to provide accurate information in time to affect the plaintiff's irrevocable election, which was made in January of 1991. As such, the plaintiff's claims were properly found to be time-barred. *Librizzi*, 134 F.3d at 1306.

The timing of any injury caused by the alleged misrepresentations is irrelevant. Courts examining analogous situations have concluded that an injury need not be felt in order for a breach of fiduciary duty to be complete. For example, in *Larson v. Northrop Corp.*, 21 F.3d 1164, 1170 (D.C. Cir. 1994), a decision relied upon by the Seventh Circuit, the Court concluded that the plaintiff's ERISA cause of action accrued when the plan sponsor purchased an insufficient annuity for plan funding purposes, rather than when the plaintiff's claimed benefits were denied. In *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1178-79 (3d Cir. 1992), the Third Circuit held that the plaintiffs' claims accrued

when the employer passed an improper plan amendment, rather than when the defendant refused to pay the benefits at issue.

The Seventh Circuit has already concluded that the plaintiffs' suit was time-barred in an action with facts similar to those in this case. In *Wolin v. Smith Barney, Inc.*, 83 F.3d 847 (7th Cir. 1996), the plaintiffs were trustees of an ERISA plan who sued their investment advisor on the basis that recommended investments were unsafe when the advisor had assured the plaintiffs that the investments would be safe and liquid. The documents introduced as evidence in the case conveyed unmistakably that the investments were risky and illiquid. *Id.* at 850-51. The investment advisor's assurances were the alleged wrongdoing. The court concluded that the timing of the plaintiffs' injury was not indicative of when their suit should have been brought. *Id.* at 854.

Here, the Employees' irrevocable elections occurred in 1988 at the latest when they decided to transfer their employment to ALTEC. The Employees' transfer decisions, in reliance upon the alleged misrepresentations, occurred in 1988 at the latest. As the Seventh Circuit held below, under its own decision in *Librizzi*, and under the decisions of all of the courts that have examined this issue, the Employees' breach of fiduciary duty claims are clearly time-barred because the limitations period began to run on the date of the last action constituting a part of the breach, not on the date the Employees felt the effects of the action. *See id.*; *accord Larson v. Northrop Corp.*, 21 F.3d at 1168 ("It is ridiculous to suggest that the operation of the statute of limitations must depend on [p]laintiff's age and when he feels like retiring.").

2. The Cases Cited By The Employees Do Not Support Their Claim That Their Causes of Action Accrued in 1994.

Petitioners make no attempt to distinguish the cases cited and analyzed by the Seventh Circuit in reaching its decision. Not one of those cases is addressed in Petitioners' brief. Instead, Petitioners present a number of cases, including this Court's decision in *Varity v. Howe*, 116 S.Ct. 1065 (1996), that in reality lend no support whatsoever to their claims.

Petitioners assert that *Varity* lends support to their attempt to characterize their breach of fiduciary duty claims as a denial of benefits in order that their causes of action might accrue when the claimed benefits were denied, rather than when the alleged misrepresentations were made or when the Petitioners acted in reliance on those representations. In reality, *Varity* does nothing to support Petitioners' claims. Petitioners' argument that *Varity* recognizes a breach of fiduciary duty when claimed benefits are denied misconstrues the holding of that case and is a blatant attempt to resurrect their abandoned denial of benefits claims. *Varity* did not even address the statute of limitations on ERISA actions, and nothing in Petitioners' brief demonstrates how *Varity* provides any support for their claims.

Next, Petitioners cite *Meagher v. International Ass'n of Machinists and Aerospace Workers Pension Plan*, 856 F.2d 1418 (9th Cir. 1988), for the proposition that their claims began to run with the issuance of each check that was not in accordance with the benefits Petitioners expected. This analysis must fail. *Meagher* was quite clearly a denial of

benefits case in which the plaintiff sought to recover benefits to which he was entitled under his benefits plan's written terms. *Id.* at 1422-23. *Meagher* is readily distinguishable from the facts presented by the Employees: *nothing* in the terms of the ALTEC Plan indicates that the Employees are entitled to the benefits they claim. To the contrary, as the Seventh Circuit recognized, the Plan's terms expressly indicate that the Employees are entitled to receive a pension only for their years of service at ALTEC.

Petitioners also cite another denial of benefits case, *Starr v. JCI Data Processing Inc.*, 767 F. Supp. 633 (D. N.J. 1971), to support their claim of a conflict in the circuits. First and foremost, a district court case does not demonstrate a conflict in the circuits. In any event, even if *Starr* had been an appellate decision, Petitioners' arguments are misplaced. *Starr* involved claims for denial of benefits and failure to provide requested information to plan beneficiaries. *Id.* at 636. The district court concluded that the defendant breached its fiduciary duties annually each year that it failed to comply with ERISA's provisions. However, the plaintiffs' claims that occurred more than 6 years before his complaint was filed were held to be time-barred. *Id.* at 638.

Had Petitioners read the entirety of the next case they cite, *Ziegler v. Connecticut General Life Ins. Co.*, 916 F.2d 548, 552 (9th Cir. 1990), they would have realized that a breach of a fiduciary duty does not require that actual harm to the plaintiff result before a plaintiff's cause of action accrues. The *Ziegler* court wrote:

> [N]ot all ERISA actions for breach of fiduciary duties require an occurrence of harm before they will accrue. Indeed, the statute of limitations on ERISA actions such as [the plaintiff's] includes no requirement of actual harm. . . . Thus, it was unnecessary to await an actual injury or harm before the ERISA violation became actionable. . . .

Id. at 550-51.

3. Petitioners' Trust Law Analysis Lends No Support To Their Claims.

Petitioners devote several pages of their Petition to quote from *The Restatement of Trusts* and *Corpus Juris Secundum* and to discuss fraud cases. Neither the District Court nor the Seventh Circuit relied on these treatises to support their decisions. That, however, did not serve to deter the Petitioners from a lengthy discussion attempting to support their viewpoint with these authorities.

Petitioners' trust law analogy is apparently in response to *Varity's* conclusion that the federal common law of trusts should be applied to fill in any gaps not addressed by ERISA. This analysis completely ignores the fact that ERISA sets forth a statute of limitations that is directly applicable to the Employees' claims. As a result, there is no need for this Court to turn to the law of trusts to resolve the issues presented by this case.

4. The Court of Appeals' Decision Promotes Equitable and Just Results.

Petitioners' argument that they had no way of knowing the status of their pension benefits until they began receiving pension checks completely ignores the fact that ALTEC distributed *numerous* documents, from 1986 on, setting forth the fact that Petitioners' ALTEC pensions would be based on their service with ALTEC only. Their claim that the Seventh Circuit's decision is inequitable implies that plaintiffs should be able to ignore completely any and all written plan documents distributed to them and wait until their retirement to pursue a cause of action based upon alleged oral statements that conflict with the plan documents. Such a result was clearly not intended by Congress, which intended to promote disclosure and clarification of benefits plans when it enacted ERISA. ERISA § 2 (a), 29 U.S.C. § 1001 (a).

Finally, policy considerations dictate that the Seventh Circuit's analysis was correct. No other rule would make sense. Holding otherwise would mean that a plaintiff could hear a representation, retire thirty years later, and still file suit based upon an alleged misrepresentation that was made decades prior. No statute of limitations would ever run under such an analysis. This Court should decline Petitioner's invitation to promulgate such a rule.

CONCLUSION

The Seventh Circuit's decision affirming summary judgment in the Respondents' favor on the Employees' ERISA-based breach of fiduciary duty claim was proper

and in accordance with applicable law. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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In the
Supreme Court of the United States

OCTOBER TERM 1999

JAMES SPANGLER, DONALD MELCHER, WAYNE J. BIELEFELDT, ET AL.,

Petitioners,

v.

ALTEC INTERNATIONAL LIMITED PARTNERSHIP, CHART INDUSTRIES, INC. and ALTEC INTERNATIONAL LIMITED PARTNERSHIP PENSION PLAN AND TRUST FOR HOURLY EMPLOYEES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. RESPONDENTS STATEMENT OF "QUESTION PRESENTED FOR REVIEW" INACCURATELY MISSTATES THE ISSUES PRESENTED. 1

II. RESPONDENTS' BRIEF RAISES NEW FACTS, NOT OF RECORD. 2

III. RESPONDENTS MISSTATE AND MISCHARACTERIZE THE NATURE, EXTENT, AND SIGNIFICANCE OF DOCUMENTS GIVEN TO PETITIONERS. 3

IV. THE PRINCIPAL CASES RELIED UPON BY RESPONDENTS ARE READILY DISTINGUISHABLE. 5

V. RESPONDENTS IGNORE AND MISSTATE THE APPLICABILITY OF *VARITY V. HOWE*, 516 U.S. 489 (1996) TO THE PRESENT CASE. 9

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Larson v. Northrop Corp.,
21 F.3d 1164 (D.C.Cir. 1994) 6-8

Librizzi v. The Children's Memorial Medical Center,
134 F.3d 1302 (7th Cir. 1998) 5, 6

Varity v. Howe,
516 U.S. 489 (1996) 9

STATUTES

29 U.S.C. §1113 . . . . . 6, 7, 9

INTRODUCTION

Respondents, in their Brief in Opposition to Petitioners' Writ of Certiorari, have raised several points, which are new and inaccurate misstatements of fact and law. These points will be addressed individually in the following sections of this Reply Brief.

I. RESPONDENTS STATEMENT OF "QUESTION PRESENTED FOR REVIEW" INACCURATELY MISSTATES THE ISSUES PRESENTED.

Respondents, in their Brief in Opposition, assert that the question for review is whether the statute of limitations for a breach of a fiduciary duty begins to run when a Plaintiff "detrimentally relies" on the misrepresentations made. However, this question, as posed, misses the point. In this case, there was no detriment to any Petitioner until Altec failed to perform in accordance with the representations made. Thus, no detriment occurred until there was this failure to perform, which did not occur before 1994. When Petitioners joined Altec in 1985 and 1986, they fully expected Altec to abide by the previous promises and representations made. Petitioners had absolutely no reason to believe Altec would not abide by its promises. Thus, Altec's formulation of the "Question Propounded For Review" misstates the issues herein.

II. RESPONDENTS' BRIEF RAISES NEW FACTS, NOT OF RECORD.

On page 5 of Respondents' Brief in Opposition, Respondent asserts as follows:

> The Employees' pension claims in this action are based upon the fact that, *after the Employees left their employment with Trane*, Trane increased its pension multiplier. (Emphasis in the original.)

This fact is a new fact, and, indeed, is not supported by the record. It is not part of Petitioners' assertion and is not a basis for Petitioners' claims.

Petitioners assert that Altec courted Petitioners while Petitioners were still employees with Trane Company. The purpose of this courtship by Altec was to induce experienced and skilled Trane employees to join Altec. In this courtship, Altec made numerous representations to the Petitioners that Petitioners' pension benefits (if they joined Altec) would be the same as if they had stayed with Trane. In other words, not only would the Trane Company employees who joined Altec receive credit for their years of service with Trane Company, but in addition, the ultimate pension benefits provided would be the same for Petitioners as if Petitioners had stayed with Trane. These facts of record are at the core of Petitioners' contentions in this action.

The fact is, there were representations made by Altec officials to Petitioners that induced Petitioners to join

Altec. These representations became the basis of a fiduciary duty by Altec to abide by the promises made. It was not until 1994 that Petitioners began to learn that Altec was not going to abide by the promises made 8 to 9 years earlier. It was not until 1994 that Petitioners first learned or gained any knowledge, whatsoever, that Altec would not live up to the previous promises made which had formed the heart of its fiduciary duties to Petitioners.

From this, it is clear that Petitioners' claims are not "based upon the fact that, after the Employees left their employment with Trane, Trane increased its pension multiplier." Altec's misstatement of Petitioners' claims is not supported by the record.

III. RESPONDENTS MISSTATE AND MISCHARACTERIZE THE NATURE, EXTENT, AND SIGNIFICANCE OF DOCUMENTS GIVEN TO PETITIONERS.

On page 6 of Respondents' Brief in Opposition, Respondents assert that

> "Employees were given numerous documents that detailed the exact scope of ALTEC's benefits program. The documents made clear that only years worked for ALTEC would be used in calculating pension benefits."

Altec, did, in 1986, distribute documents to all employees that showed Altec employee benefit calculations; nevertheless, these documents, did not indicate that the

benefit calculations and information in the documents applied to the former Trane employees. These documents described the benefits for regular Altec employees and did not apply to Petitioners, a special category of employees who had been promised extra retirement benefits equal to the benefits they would have received had they remained at Trane. Petitioners knew, because they had been told by Altec, that Altec would go ahead with its purchase of Trane's Brazed Aluminum Products Division only if the Petitioners agreed to leave Trane and join Altec to develop and train its workforce. Based upon the representations made by Altec, Petitioners had no reason to believe that the pension calculations in the documents served any purpose other than as a comparison between what non-former Trane employees would receive versus what the Trane employees would receive from Altec. Nothing in these documents therefore gave the Petitioners any reason to believe that their benefits would be anything other than as had been represented by the Altec officials in 1985 and 1986.

Because of what the Petitioners were told, they reasonably believed the written documents did not apply to them, a special group being persuaded to join Altec. Since the Petitioners constituted this special group, there was not a conflict between what they were promised and the written plan covering employees who were not part of that special group. The documents given simply did not apply to Petitioners. Respondents' discussion in their Brief, therefore, misstates the nature and significance of the documents provided.

IV. THE PRINCIPAL CASES RELIED UPON BY RESPONDENTS ARE READILY DISTINGUISHABLE.

In support of Respondents' argument that Petitioners' causes of action arose in 1988 and are time-barred, Respondents rely upon several cases. However, Respondents' broad-brush analysis of these cases mischaracterizes their holdings insofar as they relate to the present case. Among the cases cited by Respondents, *Librizzi v. The Children's Memorial Medical Center*, 134 F.3d 1302 (7th Cir. 1998).

In *Librizzi*, the Plaintiff contended that the Defendant employer failed to give accurate advice about Plaintiff's eligibility for benefits. It was alleged this poor advice led Plaintiff to make poor choices concerning his retirement options. The alleged actionable statements made by the Defendants were in July of 1990. The Plaintiff, in 1991, chose early retirement based upon the statements made; he began receiving benefits in February of 1991. Plaintiff then asked his employer, in October of 1991, to change his retirement package. Suit was not commenced until April of 1996. See, *Librizzi*, 134 F.3d at 1305.

The Seventh Circuit correctly reasoned that the only logical conclusion was that in October of 1991 when the Plaintiff sought to change the retirement package, he was aware of the allegedly incorrect nature of the advice he had previously been given. This knowledge was the logical basis for the October 1991 request.

Therefore, based upon a straightforward application of the statute of limitation (*i.e.* ERISA Section 413(a), 29 U.S.C. §1113), the Court determined the statute had run. The damage was done and the Plaintiff "had actual knowledge of the breach or violation" of the duty in 1991, and suit was commenced in 1996, more than three years after Plaintiff had actual knowledge of the breach. See *Id.*

However, the instant case presents a far different circumstance than the Court faced in *Librizzi*. In contrast to the facts in *Librizzi*, while the representations and promises in this case made in 1985 and 1986 formed the fiduciary duties that Altec ultimately breached in 1994, the breach occurred only when there was an actual failure to perform the duties in 1994, and there are clear issues of fact whether Altec effectively notified the Petitioners of its intent to pay the lesser benefits prior to October 1994, when the Petitioners first began to retire. *Librizzi* does not address such circumstances and thus does not apply.

Another case relied upon by the Respondents is *Larson v. Northrop Corp.*, 21 F.3d 1164 (D.C.Cir. 1994). *Larson* is also inapplicable. In *Larson*, the Plaintiff-Appellant was employed by the Fuller Company continuously from 1959 until 1985. From 1971 until 1981, the Fuller Company was a subsidiary of the Defendant, Northrop Corporation. When Northrop purchased the Fuller Company in 1971, it terminated the existing employee's retirement plan and replaced it with a new employee benefit plan. See *Larson*, 21 F.3d at 1165.

In 1981, Defendant Northrop terminated the plan and purchased a group annuity contract from Principal

Mutual Life Insurance Company to fund the pension plan and the Defendants' liabilities thereunder. More than six years after Northrop terminated the existing pension plan and substituted it with a group annuity contract from Principal, the Plaintiff brought his action. The Plaintiff contended that the Defendant Northrop violated its ERISA fiduciary duties. See *Larson*, 21 F.3d at 1166. In essence, the *Larson* plaintiffs contended that defendants violated their fiduciary duty in changing the plans and that in the course of changing the plans, the benefits to be received by the participants were reduced (thereby causing damage to the plaintiffs at that time).

This is different from what this Court is presented with in this case. Here, Petitioners contend that Altec breached its fiduciary duty simply by not paying, when due, the benefits promised, and that until payment was due (when Petitioners began to retire) the Petitioners did not realize their retirement benefits were less than had been promised. The promises made in 1985 and 1986 formed the basis of the agreement that Petitioners understood to be in existence between Altec and the Petitioners. No steps were taken at that time to implement the agreement (unlike in *Larson*, where a group annuity was purchased), nor were any steps necessary at that time. Under these circumstances, for all the reasons previously argued, there could be no breach until Altec actually failed to abide by its promises or, at least, took affirmative steps, with Petitioners knowledge, not to abide by its promises. In *Larson*, the Defendants knowingly and publicly changed their obligations and duties and knowingly and publicly changed the rights of the employee plan participants, to their

detriment, when defendants changed plans in December of 1981.

> Northrop's purported breach of fiduciary duties under 29 U.S.C. § 1104(a) occurred on December 21, 1981, when Northrop purchased the allegedly deficient group annuity contract from Principal in substitution for the plan it had terminated.

See *Larson*, 21 F.3d at 1171.

In the present case, Petitioners do not contend that Altec, by specific acts in 1985 and 1986, amended the employee retirement plan. Petitioners contend that at that time, Altec made specific promises as to what the nature and extent of these Petitioners' (as a special group) benefits would be under that plan. Unlike *Larson*, where an annuity was purchased, no further steps relating to Altec's representations and promises were taken by Altec until 1994. When, in 1994, Altec failed to perform in accordance with its earlier promises, it then breached its fiduciary duties. Under these facts, Petitioners did not know their benefits would be less than promised until 1994. Thus, *Larson* presents materially different circumstances and is inapplicable.

V. RESPONDENTS IGNORE AND MISSTATE THE APPLICABILITY OF *VARITY V. HOWE*, 516 U.S. 489 (1996) TO THE PRESENT CASE.

A review of Respondents' Brief in Opposition reveals that they have totally failed to address the critical language from *Varity v. Howe*, 516 U.S. 489 (1996), which was quoted by Petitioners in their Petition for Writ of Certiorari, by which this court indicates that it is the employer's failure to pay the benefits in question that constitutes the breach of the fiduciary duty. In *Varity* this court specifically characterized "a denial of benefits as a breach of fiduciary duty." 516 U.S. at 514.

If Respondents' interpretation of *Varity* is to be given credence, a strong argument in favor of certiorari is presented, because Respondents' interpretation and the above-quoted *Varity* language are inconsistent so that clarification by this court is required. The question of how 29 U.S.C. §1113(1)(A) applies to a *Varity*- type breach of fiduciary duty case is a significant issue that should be addressed and clarified by the Supreme Court.

CONCLUSION

For the reasons set forth in Petitioners' Petition for Writ of Certiorari, together with the arguments presented within this Reply Brief, Petitioners respectfully request that their Petition for Writ of Certiorari be granted.

Respectfully submitted,

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